

EXHIBIT 42

PART 2

<p style="text-align: right;">Page 98</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 extent.</p> <p>3 Q. Then in paragraph 16, you begin your</p> <p>4 analysis, I guess.</p> <p>5 You say, "Economics often model the</p> <p>6 introduction of a new good by describing a world</p> <p>7 in which the new good was always available in</p> <p>8 theory, but was only available at a</p> <p>9 prohibitively high price - a price at which no</p> <p>10 one would be willing to buy the good (often</p> <p>11 called the choke price).</p> <p>12 "Once a firm is able to offer the new</p> <p>13 good at a price that's is not prohibitively</p> <p>14 high, (i.e., at a price for which there will</p> <p>15 be positive demand and which makes sense, on</p> <p>16 the whole, for the firm), the firm will then</p> <p>17 introduce that good into the market"; right?</p> <p>18 A. That's what it says.</p> <p>19 Q. Correct. So it says "Once a firm is</p> <p>20 able to offer the new goods." So the firm here</p> <p>21 is Google; right?</p> <p>22 A. Well, here, I'm describing there's no</p> <p>23 -- I mean here I'm describing an economic</p> <p>24 principle.</p> <p>25 Q. When you're applying that economic</p>	<p style="text-align: right;">Page 100</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. So from the consumer perspective,</p> <p>3 they're not paying a price?</p> <p>4 A. The consumer is not paying to use a</p> <p>5 search tool, correct.</p> <p>6 Q. So the analysis of the choke price</p> <p>7 here really should look at Google's price</p> <p>8 or cost, the cost to Google; correct?</p> <p>9 A. Sorry, could you repeat that?</p> <p>10 Q. It says, "Once a firm," here Google,</p> <p>11 "is able to offer the new good at a price that</p> <p>12 is not prohibitively high," don't we have to</p> <p>13 consider the cost to Google of providing the</p> <p>14 good?</p> <p>15 MR. McGOWAN: I just object. That's</p> <p>16 actually not the sentence you were reading,</p> <p>17 and it sounds like you were quoting.</p> <p>18 You may answer.</p> <p>19 MS. ZACK: I quoted the whole</p> <p>20 paragraph.</p> <p>21 MR. McGOWAN: You inserted a couple</p> <p>22 of words.</p> <p>23 MS. ZACK: I'm sorry.</p> <p>24 Q. "Once a firm is able to offer the new</p> <p>25 good at a price that is not prohibitively high,</p>
<p style="text-align: right;">Page 99</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 principle to this scenario, the firm is Google;</p> <p>3 right?</p> <p>4 A. Correct.</p> <p>5 Q. When you talk about the choke price,</p> <p>6 you say, "It's a prohibitively high price - a</p> <p>7 price at which no one would be willing to buy</p> <p>8 the good."</p> <p>9 Now the price is set by the firm;</p> <p>10 correct?</p> <p>11 A. The price is set by the firm.</p> <p>12 Q. The firm here is Google?</p> <p>13 A. Well, again, here I'm describing a</p> <p>14 general context. When I apply it later, I'm</p> <p>15 talking about Google.</p> <p>16 Q. But I'm talking about theory, the</p> <p>17 firm is the seller or the provider of the good;</p> <p>18 correct?</p> <p>19 A. Here when I'm talking about the firm,</p> <p>20 I'm talking about the provider of the good,</p> <p>21 correct.</p> <p>22 Q. Google has never charged for its</p> <p>23 search tool; right?</p> <p>24 A. Google has not charged for its search</p> <p>25 tool.</p>	<p style="text-align: right;">Page 101</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 (i.e., at a price for which there will be</p> <p>3 positive demand and which makes sense, on the</p> <p>4 whole, for the firm), the firm will then</p> <p>5 introduce that good into the market."</p> <p>6 So in the context of this case, we're</p> <p>7 talking about Google; correct?</p> <p>8 A. We are talking about Google in this</p> <p>9 case.</p> <p>10 Q. So this sentence could read once</p> <p>11 Google is able to offer the new good, and the</p> <p>12 new good here is the Google Book search tool; is</p> <p>13 that right?</p> <p>14 A. The new good is the Google Book</p> <p>15 search tool.</p> <p>16 Q. So once Google is able to offer the</p> <p>17 Google Books search tool at a price that is not</p> <p>18 prohibitively high, i.e., at a price for which</p> <p>19 there will be positive demand and which makes</p> <p>20 sense on the whole for Google, Google will then</p> <p>21 introduce that good into the market, meaning the</p> <p>22 search tool; is that right?</p> <p>23 MR. McGOWAN: Can I have the</p> <p>24 question.</p> <p>25 A. Yeah, what is the question?</p>

<p style="text-align: right;">Page 102</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Is that the application of this</p> <p>3 sentence to this case?</p> <p>4 A. So in this, in this paragraph, I'm</p> <p>5 explaining how economists model the introduction</p> <p>6 of a new good.</p> <p>7 So a convenience that economists use</p> <p>8 to model or a framework that economists use to</p> <p>9 model the introduction of a new good is to</p> <p>10 behave as if the good always existed, but was</p> <p>11 available at a very high price.</p> <p>12 And then in our models, we think</p> <p>13 about, at some point, the product becomes viable</p> <p>14 in the marketplace. Usually, that may mean when</p> <p>15 it's invented.</p> <p>16 So here, for Google, what I'm saying</p> <p>17 is, you know, at some point, this product was</p> <p>18 impossible. It could not have produced this</p> <p>19 product.</p> <p>20 At some point, it made sense for</p> <p>21 Google to embark on producing this product, and</p> <p>22 they produced this product.</p> <p>23 Q. But there's a price or a cost to</p> <p>24 Google to producing the product; correct?</p> <p>25 A. There was definitely a cost to Google</p>	<p style="text-align: right;">Page 104</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection. Lacks</p> <p>3 foundation. Calls for legal conclusion.</p> <p>4 A. So I am sure, as any firm, when they</p> <p>5 launch a new project, Google had to consider all</p> <p>6 of the, you know, potential benefits of the</p> <p>7 project and the potential costs.</p> <p>8 And I would imagine that all</p> <p>9 potential -- all potential costs should, as an</p> <p>10 economic principle, be included in that</p> <p>11 analysis.</p> <p>12 Q. In this particular case, a cost is</p> <p>13 possible, that engaged in, that they are</p> <p>14 violating copyrights; correct?</p> <p>15 MR. McGOWAN: Objection to the extent</p> <p>16 it calls for legal conclusion, foundation.</p> <p>17 You may answer.</p> <p>18 A. So in undertaking this project, I</p> <p>19 would -- any firm that's undertaking the start</p> <p>20 of any project, should include all potential</p> <p>21 costs in, you know, and the probability of</p> <p>22 paying them, in assessing whether the project</p> <p>23 makes sense.</p> <p>24 And so for Google, potential</p> <p>25 litigation costs of this project should, should</p>
<p style="text-align: right;">Page 103</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 of producing the product.</p> <p>3 Q. That goes into what the price would</p> <p>4 be that they have to charge for?</p> <p>5 A. Well, you know, I guess here we</p> <p>6 might, you know, you know, in this paragraph</p> <p>7 since I'm, you know, speaking of the general</p> <p>8 economic modeling framework, I'm describing the</p> <p>9 price of the good quite straightforwardly.</p> <p>10 Of course, for Google, you know, like</p> <p>11 broadcast television, the consumer doesn't pay</p> <p>12 to consume it. But, you know, advertising and</p> <p>13 other things are sold.</p> <p>14 So what I'm saying is, you know,</p> <p>15 Google introduced this product when, you know,</p> <p>16 when it probably; A, had the idea; and B, made</p> <p>17 sense for Google to embark on this project.</p> <p>18 Q. Well, I mean what it says is that,</p> <p>19 "Once a firm," meaning here Google, "is able to</p> <p>20 offer the new good at a price that is not</p> <p>21 prohibitively high."</p> <p>22 Now in considering that in this case,</p> <p>23 don't you think Google would have had to</p> <p>24 consider the cost of copyright infringement</p> <p>25 suits?</p>	<p style="text-align: right;">Page 105</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 have been considered as a matter of economics,</p> <p>3 when thinking about whether or not to launch the</p> <p>4 project, as it should for any production</p> <p>5 process.</p> <p>6 Q. Would this analysis that you have in</p> <p>7 paragraph 16, would any firm seeking to offer a</p> <p>8 new good to the market, consider whether it was</p> <p>9 legal or not to do so?</p> <p>10 A. So any firm offering a new good to</p> <p>11 the market would, you know, have to consider</p> <p>12 whether it was legal to offer the new good to</p> <p>13 the market or not.</p> <p>14 Q. Referring you to paragraph 17. Well,</p> <p>15 before I get there, what other factors would</p> <p>16 Google consider in determining whether the</p> <p>17 product or the new good made sense for the firm?</p> <p>18 A. So they would consider, I think, the</p> <p>19 potential revenues from the product. They would</p> <p>20 consider the cost for the -- some estimate of</p> <p>21 the cost of the product.</p> <p>22 They may, there may be issues</p> <p>23 regarding thinking about the fit of the product</p> <p>24 with the rest of the company's offerings. And</p> <p>25 the fit of the product, the relationship of the</p>

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1 J.A. Chevalier - CONFIDENTIAL
 2 product to the general mission of the company.
 3 Q. Would it be your view that the
 4 potential benefits to Google, as a firm, would
 5 have to substantially outweigh the costs before
 6 they would go to market with a new good?
 7 A. So, of course, many times when a firm
 8 makes a new product launch, you know, after the
 9 fact, it may or may not turn out to be, you
 10 know, it may not turn out to be valuable for the
 11 firm.
 12 But at the time of making the launch,
 13 the firm would consider whether the benefits on
 14 net to the firm, in this case Google, exceed the
 15 costs.
 16 But the benefits and the costs may
 17 be, you know, very widespread. So, you know, it
 18 may not just be -- the benefits may be, you
 19 know, this product will, you know, further
 20 Google's mission or this product will, you
 21 know -- the benefits have to be appropriately
 22 considered, but the benefits have to exceed the
 23 costs for any product to be launched.
 24 Q. So as a matter of economics, you
 25 would assume here that Google determined that

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1 J.A. Chevalier - CONFIDENTIAL
 2 provides value to authors, or whether Google
 3 Books has superceded a potential market for
 4 books or licenses.
 5 Well, I may find the question of how
 6 Google made the decision to launch the Library
 7 Project interesting, it's not germane to the
 8 answer to those three questions.
 9 Q. You assessed in answering the
 10 question whether or not it was a new good,
 11 meaning Google Books, you assessed the
 12 consumer's side of the equation; correct?
 13 A. I did.
 14 Q. But you didn't assess the Google side
 15 of the equation?
 16 A. So in the literature on new goods,
 17 and in the literature and in the practice of how
 18 to assess whether a good is a new good, the
 19 consumer side is the, the consumer -- the
 20 important test for whether tests for whether a
 21 good is a new good, are on the consumer side.
 22 We observe that the product has been
 23 introduced. Then we can assess whether that
 24 product meets needs that have previously been
 25 unmet or poorly met.

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1 J.A. Chevalier - CONFIDENTIAL
 2 the benefits to it of launching Google Books,
 3 exceeded the cost, including the cost of
 4 litigation?
 5 MR. McGOWAN: Objection, foundation,
 6 compound.
 7 You may answer.
 8 A. So, you know, as a matter of
 9 strategy, Google should undertake an analysis of
 10 the benefits and costs of the project upon
 11 launch.
 12 But I don't have any basis for which
 13 to know whether, you know they appropriately,
 14 whether they, you know -- I don't have any
 15 insight into the analysis that they undertook,
 16 other than what's contained in the record.
 17 Q. Because you didn't ask them?
 18 A. There's some discussion of it in the
 19 record, but I did not ask for a separate
 20 analysis of that.
 21 Q. Is that because you didn't care about
 22 the benefits to Google?
 23 A. As I've explained before, my report
 24 covers three questions. The question of whether
 25 Google Books is a new good, whether Google Books

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1 J.A. Chevalier - CONFIDENTIAL
 2 Q. Do you think the Partner Program
 3 poorly meets the needs of consumers?
 4 MR. McGOWAN: Objection, vague.
 5 You may answer.
 6 A. I'm sorry, do you mean does the
 7 Partner Program, alone, poorly meet the needs of
 8 consumers?
 9 Q. Yes.
 10 A. The Partner Program, alone, does not
 11 meet the needs of the consumers, to the extent
 12 to which the entire project does.
 13 Surely, some consumers would find
 14 benefit in the Partner Program.
 15 Q. Would consumer needs be more fully
 16 met if Google displayed entire books?
 17 A. So you mean with the existing search
 18 functionality, but simply returned to the entire
 19 book?
 20 Q. Yes.
 21 A. Consumer needs, I think, consumers
 22 would, consumers would certainly benefit from
 23 being able to obtain more than the snippets.
 24 Q. Well, if Google displayed, in
 25 response to consumer requests, entire digital

28 (Pages 106 - 109)

<p style="text-align: right;">Page 110</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 copies of all books, whether in copyright or out</p> <p>3 of copyright, wouldn't that be a benefit to</p> <p>4 consumers?</p> <p>5 A. Yes, that would be a benefit to</p> <p>6 consumers.</p> <p>7 Q. Would that be a new good?</p> <p>8 MR. MCGOWAN: Objection, vague.</p> <p>9 You may answer.</p> <p>10 A. Yes, it would be a benefit to</p> <p>11 consumers and, yes, it would be a new good. It</p> <p>12 would be a, it would certainly be a benefit to</p> <p>13 the consumers, using the site at that moment.</p> <p>14 Q. I'm not quite sure I understand the</p> <p>15 caveat there?</p> <p>16 A. So the caveat is if Google, if Google</p> <p>17 or another entity were to do something that</p> <p>18 actually destroyed the market for books by --</p> <p>19 well, of course, it wouldn't single handedly</p> <p>20 destroy the market for books, but if Google were</p> <p>21 to do something that substantially diminished</p> <p>22 the market for books, then one might worry as</p> <p>23 is, you know, the basis for intellectual</p> <p>24 property law, that the market for books would</p> <p>25 ultimately shrink.</p>	<p style="text-align: right;">Page 112</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 not the case at hand.</p> <p>3 But in general, you know, given that</p> <p>4 consumers don't pay to use the search</p> <p>5 functionality, they can't, you know, they can't</p> <p>6 be -- they would, in general, not be worse off</p> <p>7 from the existence of the search functionality.</p> <p>8 But the extent to which they benefit</p> <p>9 is a function of the quality of the search</p> <p>10 functionality and the comprehensiveness of the</p> <p>11 works included.</p> <p>12 Q. Well, in order for something to be a</p> <p>13 new good, do consumers have to benefit?</p> <p>14 A. Yes. So in order for something to</p> <p>15 be -- well, as I explained in the thing, in</p> <p>16 order for something to be a new good, consumers</p> <p>17 have to have a willing -- consumers have to have</p> <p>18 -- it has to meet a need that was previously</p> <p>19 unmet. So the need implies consumers have to</p> <p>20 benefit.</p> <p>21 Q. So if we think of a new good that</p> <p>22 consumers don't have to pay for because it's</p> <p>23 given away free, but it was a neutral on</p> <p>24 benefit --</p> <p>25 MS. ZACK: Withdraw that.</p>
<p style="text-align: right;">Page 111</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 In this case, as I discuss in my</p> <p>3 later section, I believe that the functionality</p> <p>4 that Google provides is a compliment for the</p> <p>5 market for books, rather than a substitute. So</p> <p>6 no such concern arises.</p> <p>7 Q. Can't a new good benefit consumers</p> <p>8 and also destroy a different market?</p> <p>9 A. I think the concern is that if you --</p> <p>10 it depends, you know, I think the time horizon</p> <p>11 is an issue here.</p> <p>12 If Google were to display entire</p> <p>13 copies of books, the consumers who, without, you</p> <p>14 know, entire copies of books for which there was</p> <p>15 otherwise a market, and that led consumers to</p> <p>16 buy fewer books, then that would lead to fewer</p> <p>17 books being produced, which would ultimately</p> <p>18 harm consumers.</p> <p>19 Q. Since the price that consumers pay</p> <p>20 for Google Books search is zero, is there any</p> <p>21 reason why they wouldn't be benefited by Google</p> <p>22 Books?</p> <p>23 A. So since the price that consumers pay</p> <p>24 is zero -- well, I described one scenario where</p> <p>25 consumers could ultimately be harmed. That's</p>	<p style="text-align: right;">Page 113</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. -- a new product that, is given away</p> <p>3 free, sort of neutral to the consumers, that's</p> <p>4 not a new good?</p> <p>5 A. That's if's, if it's a product that</p> <p>6 is given away free and consumers, you know,</p> <p>7 don't derive substantially utility from it,</p> <p>8 different from previous goods, then they, then I</p> <p>9 wouldn't consider that a new good.</p> <p>10 Q. Referring you to page 6 of your</p> <p>11 report, footnote 28, please?</p> <p>12 A. Yes.</p> <p>13 Q. You write, "It is important to note</p> <p>14 that the search and index capabilities that</p> <p>15 define Google Books are feasible only through</p> <p>16 the scanning and digitization of the underlying</p> <p>17 book in its entirety. In order to present</p> <p>18 results that are relevant to each user's search,</p> <p>19 the entire book must be scanned and digitized.</p> <p>20 Therefore, while it is true that an input to</p> <p>21 Google Books is the scan, digitized book in its</p> <p>22 entirety, the output, which represents the</p> <p>23 actual use of the Google books, employs only</p> <p>24 small portions of the book, at most."</p> <p>25 A. Yes.</p>

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1 J.A. Chevalier - C O N F I D E N T I A L
2 Q. Now the input or in the output,
3 includes digital copies to the libraries; right?
4 MR. McGOWAN: Objection, vague.
5 You may answer.
6 A. So as I've said before, it is my
7 understanding that Google has provided the
8 functionality of two libraries for libraries to
9 make their own digital copy.
10 I am not, you know, clearly here, I
11 am describing the Google Books, I'm describing
12 the Google Books website.
13 Q. Well, when you talk about input to
14 Google Books, and output -- all right, so an
15 input to Google Books, do you consider the scan,
16 library scan, to be an input to Google Books?
17 MR. McGOWAN: Objection, vague.
18 You may answer.
19 A. So as I say here, "Therefore, while
20 it is true that an input to Google books is the
21 scanned, digitized book," yes.
22 Q. Then you're talking about the output
23 being the Google Books itself?
24 A. Yes.
25 Q. You say it "employs only small

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1 J.A. Chevalier - C O N F I D E N T I A L
2 portions of book, at most"?
3 You previously testified that the,
4 even for the Google Library Project, the entire
5 book was available for search; right?
6 A. So for the Google Library Project,
7 yes, the entire book is searched, but the output
8 is the search result that the consumer receives.
9 And the output is only a small
10 portion of the book.
11 Q. That's for one consumer you're
12 saying. What about all consumers?
13 MR. McGOWAN: Objection, vague.
14 You may answer.
15 A. So I think it is what I said, that at
16 the output for any given book, for any given
17 search, for any given consumer, is a small
18 portion of the book.
19 Q. Well, that's not what you're saying
20 says?
21 MR. McGOWAN: Objection,
22 argumentative.
23 Q. Your sentence says, "While it is true
24 that an input to Google Books is the scanned,
25 digitized book in its entirety, the output,

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1 J.A. Chevalier - C O N F I D E N T I A L
2 which represents the actual use of Google Books,
3 employs only small portions of the book, at
4 most."
5 Now the Google Books allows search of
6 entire books; correct?
7 A. So it allows, it searches the book in
8 its entirety.
9 Q. And that it also allows consumers
10 access to virtually the entirety of the book;
11 right?
12 MR. McGOWAN: Objection, vague.
13 Q. Or employs, you used the word
14 employs?
15 A. I see. So is your objection to the
16 use of the word employs?
17 Q. It's not an objection. I mean Google
18 employs more than small portions of the book;
19 doesn't it?
20 MR. McGOWAN: Objection, vague.
21 You may answer.
22 A. Okay, so I use the term input and
23 output. And by employs, I mean that the output
24 consists of only a small portion of the book.
25 I believe that your question is, by

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1 J.A. Chevalier - C O N F I D E N T I A L
2 using the word employs some what differently,
3 your question is doesn't the production of the
4 snippet that the consumer views, rely on
5 Google's having the entirety of the book,
6 because the consumers search, searches the
7 entirety of the book, and that is true.
8 Q. What about the fact that Google
9 employs the entire book to allow snippets to be
10 displayed to many different consumers and in
11 different snippets from virtually all of the
12 book?
13 MR. McGOWAN: Objection. Foundation.
14 You may answer.
15 A. So my understanding is that, yes,
16 different snippets will be viewed by different
17 consumers.
18 Q. Those snippets, over different
19 consumers, will consist of virtually the entire
20 book, except for the parts that Google
21 blacklists; correct?
22 MR. McGOWAN: Same objection.
23 You may answer.
24 A. So are you asking me as an empirical
25 matter, would it be the case that consumer

30 (Pages 114 - 117)

<p style="text-align: right;">Page 118</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 search of a particular book would lead to across</p> <p>3 all consumers, the entirety of the content of</p> <p>4 that book being eventually displayed over some</p> <p>5 period of time?</p> <p>6 Q. Yes.</p> <p>7 A. Are you asking will that happen as an</p> <p>8 empirical matter or are you asking could that</p> <p>9 happen?</p> <p>10 Q. Well, could that happen?</p> <p>11 A. So I suppose it is the case that</p> <p>12 other than the piece of the book, the parts of</p> <p>13 the book that is blacked -- well, it would be</p> <p>14 tricky because no consumer is allowed -- gets</p> <p>15 the same search terms more than a limited number</p> <p>16 of times.</p> <p>17 I suppose we could write a program --</p> <p>18 no, no, we couldn't. I suppose if I had the</p> <p>19 book, I could -- and I had millions of</p> <p>20 helpers -- no, I think it -- no, I don't think</p> <p>21 it could happen because when you search -- I</p> <p>22 think, I think it is un -- I'm not a computer</p> <p>23 scientist, and I don't profess expertise in</p> <p>24 consumer science, but I think it, the entirety</p> <p>25 of -- across all consumers, across all time,</p>	<p style="text-align: right;">Page 120</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Do you know how many?</p> <p>3 A. I don't know how many have searches</p> <p>4 -- I don't know, off the top of my head.</p> <p>5 Q. I think they post on their website</p> <p>6 that they have billions of users?</p> <p>7 A. Okay.</p> <p>8 Q. I don't know if they're all using</p> <p>9 Google Books; do you?</p> <p>10 A. Well, Google Books, you know, is</p> <p>11 returned from the core search engine, they may</p> <p>12 or may not be.</p> <p>13 Q. Google also states that it blacklists</p> <p>14 about 10 percent of a book, one out of 10 pages,</p> <p>15 I'm saying 10 percent; do you understand that?</p> <p>16 A. I understand that.</p> <p>17 Q. So that's the blacklisted portion,</p> <p>18 and then they blacklist the snippet per page.</p> <p>19 Have you read that?</p> <p>20 A. I have read that.</p> <p>21 Q. So there's a portion of the book</p> <p>22 that's blacklisted?</p> <p>23 A. Correct.</p> <p>24 Q. Other than that portion, Google makes</p> <p>25 the rest available for display in snippets;</p>
<p style="text-align: right;">Page 119</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 it's very unlikely, it seems impossible,</p> <p>3 actually, that the entirety of the text of the</p> <p>4 book would be displayed.</p> <p>5 Q. You're saying you understand that</p> <p>6 Google divides, generally, the practice is to</p> <p>7 divide the book into eighths, and they call each</p> <p>8 eighth of the book a snippet; is that right?</p> <p>9 MR. McGOWAN: Objection, foundation,</p> <p>10 and that's actually an incorrect statement.</p> <p>11 A. Do you mean the page?</p> <p>12 Q. I meant page, yes. Sorry.</p> <p>13 A. So my understanding is that a snippet</p> <p>14 is about an eighth of a page.</p> <p>15 Q. You understand that those snippets</p> <p>16 are displayed in response to search requests?</p> <p>17 A. I understand that snippets are</p> <p>18 displayed in -- a limited number of snippets are</p> <p>19 displayed in response to search requests.</p> <p>20 Q. A limited number are -- three are</p> <p>21 displayed in response to each search request;</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. But how many users does Google have?</p> <p>25 A. It has a lot.</p>	<p style="text-align: right;">Page 121</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 right?</p> <p>3 MR. McGOWAN: Objection, vague.</p> <p>4 You may answer.</p> <p>5 A. Yes, my understanding is that the</p> <p>6 rest is searchable and viewable through</p> <p>7 snippets.</p> <p>8 Q. So Google employs all of the book,</p> <p>9 except the blacklisted parts; correct?</p> <p>10 MR. McGOWAN: Objection, vague.</p> <p>11 You may answer.</p> <p>12 A. Google uses as an input, all of the</p> <p>13 book, but they don't output all of the book.</p> <p>14 Q. They don't output all of the books on</p> <p>15 a single search, but they make, they certainly</p> <p>16 will output it all, if they can, if they get</p> <p>17 enough users, they'll output it all, right,</p> <p>18 except for the blacklisted pages?</p> <p>19 A. So I'm pretty sure I'm not the best</p> <p>20 person to answer this, but my understanding is</p> <p>21 that actually wouldn't happen because, for</p> <p>22 instance, when I search for a term, say the term</p> <p>23 heart, the first three instances of the use of</p> <p>24 the term heart appear.</p> <p>25 I don't, I don't even know across</p>

<p style="text-align: right;">Page 122</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 consumers how it is one would get to the</p> <p>3 subsequent uses of the term heart. So, so, so,</p> <p>4 I don't believe it is the case that anything</p> <p>5 resembling the book, the actual book, could be</p> <p>6 outputted via the Google search engine.</p> <p>7 Q. The snippet, when you search for</p> <p>8 heart and you get some snippets that includes</p> <p>9 the word heart, but there's a lot of other words</p> <p>10 on that page than that snippet; right?</p> <p>11 MR. McGOWAN: Objection, vague.</p> <p>12 You may answer.</p> <p>13 A. Correct, there are other words.</p> <p>14 Q. People could search for those other</p> <p>15 words, right, different people?</p> <p>16 A. Let us, let us stipulate, I do not</p> <p>17 know whether it is, and I'm not an expert in the</p> <p>18 exactity of exactly how -- I know, in general,</p> <p>19 how this search engine snippet function works.</p> <p>20 I believe it not to be the case that</p> <p>21 you could receive, you know, that a billion</p> <p>22 consumers put together, could somehow assemble</p> <p>23 the entire book from the results of the Google</p> <p>24 search engine.</p> <p>25 They certainly can't because of the</p>	<p style="text-align: right;">Page 124</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 So this -- for a consumer, what is the output of</p> <p>3 Google Go Books for the set of books that are in</p> <p>4 copyright, but not in the Partner Program, it is</p> <p>5 snippets, which represent a small fraction of</p> <p>6 the book.</p> <p>7 Q. So you're talking about the</p> <p>8 experience of a single consumer using Google</p> <p>9 Books?</p> <p>10 A. Well, in this footnote --</p> <p>11 Q. Right, in this sentence?</p> <p>12 A. -- in this footnote, I'm talking</p> <p>13 about the product as it is experienced by the</p> <p>14 consumer. And so it's, you know, it is the</p> <p>15 output as experienced by the consumer.</p> <p>16 Q. But not consumers as a whole?</p> <p>17 MR. McGOWAN: Objection, asked and</p> <p>18 answered.</p> <p>19 You may answer.</p> <p>20 A. So consumers, as a whole, all</p> <p>21 experience snippets. You know, the question of</p> <p>22 whether, you know, a number, you know -- yes,</p> <p>23 consumers, as a whole, experience snippets.</p> <p>24 Q. So paragraph 20 on page 7, this is</p> <p>25 the concluding paragraph of your analysis about</p>
<p style="text-align: right;">Page 123</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 blacklisted pieces, but I think, it is my</p> <p>3 understanding, they can't just in general. But,</p> <p>4 you know, I don't know that for a fact.</p> <p>5 Q. Oh, okay, I didn't ask you about who</p> <p>6 was assembling anything.</p> <p>7 I asked you whether Google employs</p> <p>8 it?</p> <p>9 A. So the output, which is the</p> <p>10 screenshot, employs only a small portion of the</p> <p>11 book.</p> <p>12 Q. So this sentence is only about a</p> <p>13 single search?</p> <p>14 A. This sentence certainly applies to a</p> <p>15 set of searches, but this sentence was intended</p> <p>16 to describe the output as relevant to a</p> <p>17 consumer.</p> <p>18 Q. So you're talking about basically one</p> <p>19 or two searches by a single consumer?</p> <p>20 MR. McGOWAN: Objection, misstates.</p> <p>21 You may answer.</p> <p>22 A. I'm talking about the set of searches</p> <p>23 that a consumer would experience. I'm not going</p> <p>24 to say one or two.</p> <p>25 I've done many more than one or two.</p>	<p style="text-align: right;">Page 125</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 new goods; is that right?</p> <p>3 A. Correct.</p> <p>4 Q. So this is, again, your analysis here</p> <p>5 is part of the economic theory involving the</p> <p>6 development of new goods?</p> <p>7 A. Correct.</p> <p>8 MS. ZACK: We can take a break for</p> <p>9 lunch.</p> <p>10 MR. McGOWAN: Before we do that, let</p> <p>11 me note for the record, the document number</p> <p>12 you asked for is Google 05004751.</p> <p>13 MS. ZACK: I know what that is, so</p> <p>14 that's the big long list.</p> <p>15 (Luncheon recess: 12:26 p.m.)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

<p style="text-align: right;">Page 126</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 AFTERNOON SESSION</p> <p>3 (Time noted: 1:15 p.m.)</p> <p>4 JUDITH A. CHEVALIER, resumed</p> <p>5 and testified as follows:</p> <p>6 CONTINUED EXAMINATION</p> <p>7 BY ZACK:</p> <p>8 Q. Referring you to page 9 of your</p> <p>9 report, please? You have discussion throughout</p> <p>10 this section about Google Books as a complement,</p> <p>11 not substitute?</p> <p>12 A. Correct.</p> <p>13 Q. And which you talk about the fact</p> <p>14 that books get noticed, etcetera --</p> <p>15 A. Correct.</p> <p>16 Q. -- through Google Books, and that</p> <p>17 that's a benefit. You conclude that's a benefit</p> <p>18 to authors; right?</p> <p>19 A. Correct.</p> <p>20 Q. That benefit is virtually exclusive</p> <p>21 to in-print authors; correct?</p> <p>22 A. I wouldn't say that. I think</p> <p>23 in-print authors will benefit more, but</p> <p>24 out-of-print authors may benefit under certain</p> <p>25 circumstances.</p>	<p style="text-align: right;">Page 128</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 by consumer demand.</p> <p>3 Q. That's true whether there is or isn't</p> <p>4 Google Books; isn't it?</p> <p>5 A. That's true whether there is or there</p> <p>6 isn't Google Books, but it's my testimony that</p> <p>7 Google Books helps drive consumer demand for</p> <p>8 books.</p> <p>9 Q. So if consumers are buying used books</p> <p>10 on Amazon, that helps drive consumer books for</p> <p>11 new books by those authors?</p> <p>12 A. I'm saying that -- I said, I think,</p> <p>13 two distinct things. The consumer may look for</p> <p>14 other books by the same author.</p> <p>15 And, you know, when consumers buy</p> <p>16 used books on Amazon, when used books, you know,</p> <p>17 when it becomes apparent that there's a lot of</p> <p>18 demand for a used book, that may assist in</p> <p>19 bringing the book back into print.</p> <p>20 Q. How does the author know if there's a</p> <p>21 lot of demand for a used book on Amazon?</p> <p>22 A. Well, for example, the price at which</p> <p>23 the book is selling in the Amazon Marketplace,</p> <p>24 reflects the, reflects the supply and demand of</p> <p>25 the book.</p>
<p style="text-align: right;">Page 127</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. Can you tell me those circumstances</p> <p>3 in which you think they'll benefit, given the</p> <p>4 way Google Books works?</p> <p>5 A. Yes. So I think they will benefit in</p> <p>6 a number of circumstances. One would be if,</p> <p>7 even though some of the authors' books are out</p> <p>8 of print and some of the books -- if in</p> <p>9 circumstances where some of the authors' books</p> <p>10 are out of print and other of the authors' books</p> <p>11 are in print, consumers may, you know, if they</p> <p>12 discover a book they're interested in via Google</p> <p>13 Books, that might lead them to other books by</p> <p>14 those authors.</p> <p>15 It may lead them to other books on</p> <p>16 the same topic, probably benefitting different</p> <p>17 authors. But I think also, there are some</p> <p>18 mechanisms and those mechanisms, I think, are</p> <p>19 becoming more relevant in the marketplace, where</p> <p>20 if consumers, say, buy used books on Amazon and,</p> <p>21 you know, there are used books on Amazon that</p> <p>22 are selling for very high prices because there's</p> <p>23 a demand for the book to come back into print.</p> <p>24 There may be circumstances in which,</p> <p>25 you know, a book could be driven back into print</p>	<p style="text-align: right;">Page 129</p> <p>1 J.A. Chevalier - CONFIDENTIAL</p> <p>2 Q. Right, so it could have a high price</p> <p>3 because it's in rare supply, but that doesn't</p> <p>4 mean there's a lot of demand; does it?</p> <p>5 A. If there's a high price for the book,</p> <p>6 and, you know, I suppose it's possible that a</p> <p>7 seller posted a high price for the book and</p> <p>8 never sells it, but if transactions are taking</p> <p>9 place at a high price, that means that there's</p> <p>10 high demand relative to supply.</p> <p>11 Q. Is that reported to authors or</p> <p>12 publishers?</p> <p>13 A. An author could easily look that up.</p> <p>14 Q. Could easily look it up where? Have</p> <p>15 you looked it up?</p> <p>16 A. Yes, so if you go to Amazon and you</p> <p>17 look at Amazon Marketplace, you would see -- and</p> <p>18 I would do this, I would advise, ff I were an</p> <p>19 author doing this for other book sellers too, I</p> <p>20 would look at the copies of my used book, and</p> <p>21 the prices that they're selling for.</p> <p>22 Q. Does that functionality tell you the</p> <p>23 prices that -- the actual sales prices?</p> <p>24 A. So it tells you the prices that</p> <p>25 sellers have posted. If you, if you were to,</p>

<p style="text-align: right;">Page 130</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 you know, look over the course of some period of</p> <p>3 time, you would observe, you would observe -- I</p> <p>4 don't know that it directly provides data on</p> <p>5 sales.</p> <p>6 But, you know, if you were to look</p> <p>7 over time, you would see that, you know, sellers</p> <p>8 who have posted a book at a particular price</p> <p>9 have, you know, moved to those books off, which</p> <p>10 would lead an author to infer that they've been</p> <p>11 bought.</p> <p>12 Q. Or taken down by the seller?</p> <p>13 A. I suppose that's possible. But since</p> <p>14 the purpose of the seller is to sell books, and</p> <p>15 it doesn't really cost them anything to keep the</p> <p>16 books on Amazon Marketplace, unless the seller</p> <p>17 had some other desire to have the book or sell</p> <p>18 it off-line or some other place, which is</p> <p>19 selling the book, I think it's reasonable to</p> <p>20 infer that, you know, a book, if your book, you</p> <p>21 know, that books that are removed from Amazon</p> <p>22 Marketplace were being sold.</p> <p>23 Q. Have you ever looked at any data from</p> <p>24 Amazon about that?</p> <p>25 A. So I don't have data from Amazon</p>	<p style="text-align: right;">Page 132</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 advertising.</p> <p>3 Q. Right, and that choice of where to</p> <p>4 place an ad can be quite important; right?</p> <p>5 A. So, yes, I think firms' decisions</p> <p>6 about where to place ads are important.</p> <p>7 Q. There are sometimes places where</p> <p>8 firms don't want ads; right?</p> <p>9 MR. MCGOWAN: Objection, foundation.</p> <p>10 You may answer.</p> <p>11 A. I understand there are circumstances</p> <p>12 where, you know, a firm would not want to</p> <p>13 advertise, say, in a venue that's a mismatch for</p> <p>14 the firm's message or product.</p> <p>15 Q. In paragraph 34 on page 10, you say</p> <p>16 "I understand that it is Mr. Harris's view that</p> <p>17 the excerpts were snippets provided by Google</p> <p>18 Books in response to a user's search bear a</p> <p>19 resemblance to these mechanisms that consumers</p> <p>20 may use to "find" a book."</p> <p>21 A. Yes.</p> <p>22 Q. Find is in quotes.</p> <p>23 So there you use the term Google</p> <p>24 Books, but again, there are two parts to it, the</p> <p>25 Partner Program and the Library Project; right?</p>
<p style="text-align: right;">Page 131</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 available to me about that. I've used data from</p> <p>3 Amazon Marketplace for books, but not for the</p> <p>4 purpose that you have just asked.</p> <p>5 Q. You have some data -- or I shouldn't</p> <p>6 say data -- discussion in here about</p> <p>7 advertising; is that right?</p> <p>8 A. Yes.</p> <p>9 Q. So you're analogizing Google Books to</p> <p>10 advertising?</p> <p>11 MR. MCGOWAN: I just ask for a</p> <p>12 reference to where you're reading.</p> <p>13 MS. ZACK: I'm sorry, it's basically</p> <p>14 throughout in different places, but an</p> <p>15 example is on page 9, paragraph 28.</p> <p>16 MR. MCGOWAN: Thank you.</p> <p>17 A. So I am saying that Google Books</p> <p>18 serves a function like advertising. And that it</p> <p>19 informs the consumer about the existence of</p> <p>20 books.</p> <p>21 Q. When companies decide to advertise</p> <p>22 products, they do choose where to advertise</p> <p>23 them; don't they?</p> <p>24 A. So when companies purchase</p> <p>25 advertising, they choose where to purchase the</p>	<p style="text-align: right;">Page 133</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Correct.</p> <p>3 Q. You think that both bear a</p> <p>4 resemblance to mechanisms that consumers may use</p> <p>5 to find a book?</p> <p>6 A. So as I say in the next sentence,</p> <p>7 "whether a more extensive sample of text is</p> <p>8 accessible (as in the case of the books that</p> <p>9 enter Google Books via the Partner Program) or</p> <p>10 whether snippets are available, Google Books</p> <p>11 makes it easier for a book to get noticed," so</p> <p>12 yes.</p> <p>13 Q. The previous paragraph 33 where you</p> <p>14 discuss Mr. Harris, you talked about in the</p> <p>15 second sentence, "A major role of the publisher</p> <p>16 is to attempt to achieve consumer awareness of</p> <p>17 the publisher's books. Consequently, publishers</p> <p>18 employ many tools to generate publicity about</p> <p>19 the book and to get the book noticed. These</p> <p>20 include: provision of excerpts," etcetera; you</p> <p>21 see that?</p> <p>22 A. I see that.</p> <p>23 Q. So I thought that paragraph 34</p> <p>24 related back to 33; is that true?</p> <p>25 MR. MCGOWAN: Objection, vague, and</p>

<p style="text-align: right;">Page 134</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 you may answer.</p> <p>3 Q. When you say "These mechanisms" in</p> <p>4 paragraph 34, aren't you referring to the</p> <p>5 mechanisms that you've mentioned in paragraph</p> <p>6 33?</p> <p>7 A. Yes, in 34, I am saying that the</p> <p>8 excerpts or snippets resemble the mechanisms</p> <p>9 that consumers may use to find a book or that</p> <p>10 publishers may use to help consumers find a</p> <p>11 book.</p> <p>12 Q. Let's just stick with the first</p> <p>13 sentence in paragraph 34.</p> <p>14 So "these mechanisms" refers back to</p> <p>15 the tools employed by publishers; right?</p> <p>16 A. Yes.</p> <p>17 Q. These tools that you've mentioned</p> <p>18 here that are employed by publishers, are all</p> <p>19 done pursuant to contracts with third-parties;</p> <p>20 correct?</p> <p>21 MR. McGOWAN: Objection, foundation.</p> <p>22 You may answer.</p> <p>23 A. Sorry, so you mean that the publisher</p> <p>24 undertakes these promotional activities as part</p> <p>25 of its agreement with the author?</p>	<p style="text-align: right;">Page 136</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 are similar to the mechanisms that consumers, on</p> <p>3 the buy side or publishers on the sell side,</p> <p>4 use.</p> <p>5 Q. But there is -- they bear a</p> <p>6 resemblance, but there's a major difference in</p> <p>7 that the mechanisms listed in paragraph 33</p> <p>8 involve contractual permission; correct?</p> <p>9 MR. McGOWAN: Objection, vague.</p> <p>10 You may answer.</p> <p>11 A. So I think the point, that one of the</p> <p>12 points of this section is to explain that the,</p> <p>13 that the, that the mechanisms used that involve</p> <p>14 permission, are similar to the mechanism</p> <p>15 provided by Google. That they look the same to</p> <p>16 the consumer and should have the same effect.</p> <p>17 Q. But they look different to the</p> <p>18 author; right?</p> <p>19 MR. McGOWAN: Objection, foundation.</p> <p>20 You may answer.</p> <p>21 A. As I've said, as you have said, one</p> <p>22 involves, one involves the permission, at least</p> <p>23 of the publisher, and the other does not.</p> <p>24 Q. The permission of the publisher or</p> <p>25 the author; right?</p>
<p style="text-align: right;">Page 135</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Correct.</p> <p>3 A. Yes, I believe that the publisher,</p> <p>4 that the publishers -- the publisher, I think,</p> <p>5 has some discretion in their marketing</p> <p>6 activities.</p> <p>7 But it's my understanding that the</p> <p>8 reason authors use a publisher is so -- one of</p> <p>9 the reasons an author uses a publisher is to</p> <p>10 obtain some access to some of these marketing</p> <p>11 services.</p> <p>12 Q. A snippet view in Google Books</p> <p>13 through the Library Project, involves no</p> <p>14 contract between Google and any rights holder;</p> <p>15 right?</p> <p>16 A. Correct.</p> <p>17 Q. So in that sense, there's not a</p> <p>18 resemblance, there's a difference between the</p> <p>19 mechanisms in paragraph 33 and what Google does;</p> <p>20 right?</p> <p>21 MR. McGOWAN: Objection, vague.</p> <p>22 You may answer.</p> <p>23 A. I think my language states exactly</p> <p>24 what I mean, that the type of mechanisms</p> <p>25 provided by Google are -- bear a resemblance,</p>	<p style="text-align: right;">Page 137</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. The permission of the publisher --</p> <p>3 sorry, so in Section 33, generally, I'm talking</p> <p>4 about the publisher undertaking the marketing</p> <p>5 function.</p> <p>6 There may be circumstances, say, for</p> <p>7 self-published books where the author undertakes</p> <p>8 the marketing function, but, yes.</p> <p>9 Q. In paragraph 34, at the end of the</p> <p>10 second sentence, let's -- I will start with the</p> <p>11 whole second sentence.</p> <p>12 You say, "Whether a more extensive</p> <p>13 sample of text is accessible (as in the case of</p> <p>14 books that enter Google Books via the Partner</p> <p>15 Program) or whether snippets are available,</p> <p>16 Google makes it easier for a book to get</p> <p>17 noticed, which may increase demand for that book</p> <p>18 and benefit the author."</p> <p>19 Have you done any empirical research</p> <p>20 concerning that conclusion?</p> <p>21 A. So the research I've done or the</p> <p>22 foundation for that statement are the things</p> <p>23 that I cite.</p> <p>24 I don't, there's, there, you know, I</p> <p>25 don't, I do not believe there's a data set that</p>

35 (Pages 134 - 137)

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1 J.A. Chevalier - C O N F I D E N T I A L
2 would help me to measure empirically whether,
3 whether more book sales take place as a result
4 of the existence of the Google Partner Program.

5 So there's a number of just --
6 there's a number sites in the record and
7 referenced in my report, but I didn't undertake
8 an empirical analysis.

9 Q. That's because you don't think that
10 would be possible or --

11 A. I don't have access -- I don't
12 believe, I don't believe it would be possible to
13 measure the effect of Google Books on the sales
14 of books.

15 Q. In paragraph -- I'm sorry, page 11,
16 paragraph 36, you state in the second sentence,
17 "That is, there is market-based evidence that
18 market participants - authors and publishers -
19 see value in Google Books, so much so that
20 through the Partner Program, they have opted to
21 have even larger excerpts than snippets
22 available for consumers to read."

23 A. Correct.

24 Q. In the Partner Program, you are aware
25 that the partners can have control over how

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1 J.A. Chevalier - C O N F I D E N T I A L

2 I guess I don't know exactly what
3 happens, if it is actually feasible that -- I
4 know the whole book is searched.

5 I'm exactly sure what happens if the
6 partner can block specific pages or simply
7 determines the percentage of the book that can
8 be seen. I would have to double-check on that.

9 Q. Isn't it your understanding that the
10 amount of pages that can be seen in the Partner
11 Program is fixed to certain pages?

12 MR. McGOWAN: Objection. Asked and
13 answered.

14 A. Yes, so I said I understand that the
15 fraction of the book that the user will be able
16 to browse is, is controlled by the partner in
17 the Partner Program.

18 But I do not precisely know the
19 implementation of it and, therefore, the exact
20 answer to your question.

21 Q. Does that have any bearing on your
22 report, the answer to that question?

23 A. No, the statement I make in the
24 report, the statements I make in the report are
25 still, don't, don't bear on that distinction.

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1 J.A. Chevalier - C O N F I D E N T I A L
2 large the excerpt is that is viewed; right?

3 A. I understand that, yes.

4 Q. There is no snippet view in the
5 Partner Program?

6 A. As though I understand that the
7 entire book is searched, as it is in the Google,
8 in the library program.

9 Q. The entire book is searched, and then
10 what happened?

11 A. So my understanding is that the
12 entire -- so if you type in the word guitar, the
13 entire book is searched for the word guitar.

14 But the partner controls the
15 percentage of the book that the, that the user's
16 able to see.

17 Q. So if a book in the Partner Program
18 includes the word guitar, but if that word
19 itself is not in the excerpt that the partner
20 has permitted to be viewed, what happens?

21 A. So I would, my understanding is that,
22 my understanding is that the -- my understanding
23 is that the partner chooses the percentage of
24 the book that can be seen, provides the book for
25 scanning.

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1 J.A. Chevalier - C O N F I D E N T I A L

2 Q. Are you aware that a number of
3 publishers sued Google under the copyright laws
4 with respect to Google's Library Project?

5 A. I understand that a number of
6 publishers -- that some publishers sued Google
7 as part of the Library Project, but I don't
8 believe they're currently parties to this
9 complaint or a complaint.

10 Q. What is your understanding about what
11 the publisher's claim was?

12 MR. McGOWAN: Objection to the extent
13 it calls for conclusion.

14 You may answer.

15 A. So I did not review documents from
16 that prior litigation, and so I don't know the
17 answer to your question.

18 Q. Were you aware that the publishers
19 and the publishers trade association, the AAP,
20 were parties to the same claims as the authors?

21 A. So I understood, I understand that
22 there was a previous litigation involving the
23 publishers.

24 My understanding is that that
25 litigation is not in existence anymore. So I

36 (Pages 138 - 141)

<p style="text-align: right;">Page 142</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 assumed that that litigation was ended to the</p> <p>3 publishers' satisfaction, but I don't know</p> <p>4 anything more about it.</p> <p>5 Q. You haven't asked Google about that?</p> <p>6 A. No.</p> <p>7 Q. Where did you gain the information or</p> <p>8 assumption that the publishers' case is closed?</p> <p>9 A. They are not -- I haven't read</p> <p>10 anything about the publishers' case and, you</p> <p>11 know, they are not a party to this, to this</p> <p>12 litigation.</p> <p>13 Q. So from that, you assume their case</p> <p>14 was closed?</p> <p>15 A. I assume their case was closed.</p> <p>16 Q. You don't know on what terms?</p> <p>17 A. I do not.</p> <p>18 Q. Is that relevant to you?</p> <p>19 A. No.</p> <p>20 Q. Well, you're talking here about the</p> <p>21 publishers seem to be pleased with Google;</p> <p>22 correct?</p> <p>23 A. I believe what I've said is that the</p> <p>24 publishers have found Google Books, the Partner</p> <p>25 Program, to be a program that they</p>	<p style="text-align: right;">Page 144</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 the publishers enter the Partner Program, that</p> <p>3 they have a larger portion of the book available</p> <p>4 for view?</p> <p>5 A. So the snippet -- instead of the</p> <p>6 three line snippets, what's returned in the</p> <p>7 Partner Program is, in general, a larger</p> <p>8 fraction of a, a larger readable chunk.</p> <p>9 Q. But it's a fixed chunk chosen by the</p> <p>10 publisher; correct?</p> <p>11 MR. McGOWAN: Objection.</p> <p>12 A. So as I said before, my understanding</p> <p>13 is that the publisher chooses the fraction of</p> <p>14 the book that's viewable to the consumer.</p> <p>15 Q. Have you talked to any publishers</p> <p>16 about this matter?</p> <p>17 A. I have not talked to any publishers</p> <p>18 about this matter, except Mr. Harris, who is a</p> <p>19 publishing strategist and former publisher.</p> <p>20 Q. Have you talked to anyone at Random</p> <p>21 House about this?</p> <p>22 A. I have not talked to anyone at Random</p> <p>23 House about this, though, of course, Mr. Harris</p> <p>24 is formerly of Random House.</p> <p>25 Q. Did you look at the settlement that</p>
<p style="text-align: right;">Page 143</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 overwhelmingly want to participate in.</p> <p>3 Q. Have you ever found evidence that the</p> <p>4 Google Library Project is a program that the</p> <p>5 publishers want to participate in?</p> <p>6 MR. McGOWAN: Objection, vague.</p> <p>7 You may answer.</p> <p>8 A. So since the Google library project</p> <p>9 is housed under the same search engine and</p> <p>10 integrates search with the Google Partner</p> <p>11 Program, I believe the way that a publisher</p> <p>12 expresses an interest in -- you know, the</p> <p>13 publisher doesn't have to do anything to have</p> <p>14 its book available in snippet view.</p> <p>15 If the publisher doesn't want its</p> <p>16 book available in snippet view, it can tell</p> <p>17 Google to remove the books.</p> <p>18 If the publisher wasn't more than</p> <p>19 snippets view, it joins the Partner Program.</p> <p>20 So the fact that publishers have</p> <p>21 joined the Partner Program, means that the</p> <p>22 publishers have chosen to have a larger fraction</p> <p>23 of the book viewable than would take place under</p> <p>24 the Library Program.</p> <p>25 Q. That's what you believe happens when</p>	<p style="text-align: right;">Page 145</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 was reached by publishers and authors with</p> <p>3 Google, and it was then not approved finally by</p> <p>4 the court?</p> <p>5 A. I have familiarity with that</p> <p>6 settlement. I mean I've seen it. I didn't</p> <p>7 review it for the purposes of writing this</p> <p>8 report, but I have read it previously.</p> <p>9 Q. Are you aware that the publishers</p> <p>10 consider -- that Random House, Penguin,</p> <p>11 HarperCollins, Simon & Schuster, Hachette,</p> <p>12 Macmillan, John Wiley, Houghton Mifflin and</p> <p>13 other publishers consider it extremely important</p> <p>14 that their books not be available to be</p> <p>15 digitized without a license?</p> <p>16 MR. McGOWAN: Objection, foundation.</p> <p>17 A. I know that they participate in the</p> <p>18 Partner Program. And I know that my</p> <p>19 understanding is that there is a, not a live</p> <p>20 case between these entities and Google.</p> <p>21 Q. That wasn't my question.</p> <p>22 My question was do you have any</p> <p>23 knowledge that Random House considers it</p> <p>24 important for there to be a license before its</p> <p>25 books are digitized?</p>

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1 J.A. Chevalier - CONFIDENTIAL

2 MR. McGOWAN: Objection, foundation.

3 A. So as I said, I have not spoken to

4 anyone at Random House.

5 Q. Do you know if there is a resolution

6 between publishers and Google of this case that

7 you're referring, to that requires a license?

8 MR. McGOWAN: Objection, asked and

9 answered.

10 You may answer.

11 A. I've told you pretty much everything

12 I know about the case.

13 Q. Well, you're making assumptions --

14 you made some assumptions about the fact that

15 publishers would want to participate in Google

16 Library Project; correct?

17 A. I have made, I have explained, as

18 supported by the individuals I reference and as

19 supported by the, you know, Web pages I

20 reference, that publishers have decided to

21 participate in the Partner Program.

22 I have stated that the Partner

23 Program involves larger pieces of the book being

24 viewable to consumers.

25 And I have, from that, from that

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1 J.A. Chevalier - CONFIDENTIAL

2 analysis, noted that the Library Program

3 provides snippets that are smaller than what the

4 consumer sees under the Partner Program, and

5 that the Library Program, therefore -- I have,

6 I've concluded that the publishers -- no, have

7 chosen to be part of the Partner Program, rather

8 than merely the Library Program, which provide

9 smaller snippets, nor, you know, in large part,

10 removing the books from, you know, asking Google

11 to remove the books entirely.

12 Q. Have you concluded that publishers

13 wanted their books to be digitized in the

14 Library Project?

15 A. I have not concluded that publishers

16 wanted -- at the time the Library Project was

17 undertaken, I have not concluded that publishers

18 necessarily wanted their books to be digitized.

19 Q. Have you concluded that authors

20 wanted their books to be digitized in the

21 Library Project?

22 MR. McGOWAN: Objection, vague and

23 compound.

24 You may answer.

25 A. So I have concluded that the Library

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1 J.A. Chevalier - CONFIDENTIAL

2 Project on net, economically benefits authors.

3 I have not seen any evidence in the record that

4 that's not true -- that from the named

5 plaintiffs or from Mr. Aiken's deposition, that

6 that's, you know, incorrect.

7 But clearly, the named plaintiffs

8 assert that they did not want their books to be

9 digitized.

10 So I concede that I have seen that

11 those plaintiffs did not want their books to be

12 digitized.

13 Q. Have you seen evidence that other

14 plaintiffs, other persons, excuse me, who are

15 authors, did not want their books to be

16 digitized without permission?

17 A. I would say the -- well, it's not

18 quite the same question. I have not.

19 I could note the survey that asks,

20 the Porett Survey that asks a question close to

21 that question, but it's not quite the same

22 question, so I'll say no, I haven't seen such

23 evidence.

24 Q. Google didn't provide to you copies

25 of objections to the settlement from various

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1 J.A. Chevalier - CONFIDENTIAL

2 authors who stated that they didn't want their

3 books digitized by Google without their

4 permission?

5 A. I have not seen those. I'm sure I,

6 you know, I -- yes, I have not seen those.

7 Q. It wouldn't surprise you that those

8 letters exist; right?

9 MR. McGOWAN: Objection, foundation,

10 vague.

11 You may answer.

12 A. So my report addresses the question

13 of whether the authors are benefited or harmed,

14 in an economic sense, from the project.

15 I have, I have not seen the letters

16 that you refer to, but, you know, I, I, I can

17 imagine -- I would not be surprised that some

18 letters of that sort exist.

19 Q. Well, if I have a home, and let's say

20 the fair market value is \$500,000, and it's on a

21 nice piece of property, and a builder keeps

22 telling me that he will give me a million

23 dollars for my house because he's going to knock

24 it down, build a bigger house, and I say no.

25 And then one day I come home, and the

<p style="text-align: right;">Page 150</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 house is knocked down, and there's a check for a</p> <p>3 million dollars, how does that fit into your</p> <p>4 economic theory?</p> <p>5 MR. McGOWAN: Objection, incomplete</p> <p>6 hypothetical.</p> <p>7 You may answer.</p> <p>8 Q. I've benefited?</p> <p>9 A. Well --</p> <p>10 MR. McGOWAN: Objection,</p> <p>11 argumentative. I'd like to proceed one</p> <p>12 question at a time, please.</p> <p>13 MS. ZACK: Certainly. I'll withdraw</p> <p>14 the last question.</p> <p>15 A. So I am not a lawyer, but my</p> <p>16 understanding is that while there are very few</p> <p>17 limitations to your rights, as an owner of the</p> <p>18 house, though, of course, you know, the</p> <p>19 government could declare your house, you know,</p> <p>20 knock it down.</p> <p>21 But, you know, there are very few</p> <p>22 limitations to what your ownership rights mean</p> <p>23 as an owner of a house.</p> <p>24 There are, indeed, limitations to the</p> <p>25 rights of a copyright holder. And my</p>	<p style="text-align: right;">Page 152</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 item being searched.</p> <p>3 Q. You've also said it's a benefit to</p> <p>4 the authors?</p> <p>5 A. I have said it's a benefit to the</p> <p>6 authors.</p> <p>7 Q. Have you done any analysis about how</p> <p>8 quickly, over time, new books were added to the</p> <p>9 Partner Program?</p> <p>10 A. I have not done an analysis of how</p> <p>11 quickly, over time, new books were added to the</p> <p>12 Partner Program.</p> <p>13 Q. You have some footnotes on the bottom</p> <p>14 of page 11, and these all refer -- well, not --</p> <p>15 I will take them one by one.</p> <p>16 The footnote 44, U.S. top 15</p> <p>17 publisher sales data, that's for in-print books;</p> <p>18 right?</p> <p>19 A. Yes.</p> <p>20 Q. Footnote 45 talks about the Partner</p> <p>21 Program. That's about in-print books; right?</p> <p>22 A. I would -- I would imagine that,</p> <p>23 largely, the Partner Program is about in-print</p> <p>24 books.</p> <p>25 Though, I believe you can be a member</p>
<p style="text-align: right;">Page 151</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 understanding, though I'm not a lawyer and</p> <p>3 cannot express an opinion about exactly how my</p> <p>4 economic analysis, you know, fits with, you</p> <p>5 know, the case law, my understanding is, as a</p> <p>6 copyright holder, there are limitations to the</p> <p>7 copyright holder's rights, in that whether a</p> <p>8 usage of the copyright holder's works</p> <p>9 economically harms or benefits the copyright</p> <p>10 holder, is a relevant factor in a way in which</p> <p>11 it may not be for your house.</p> <p>12 Q. So your analysis is assuming that</p> <p>13 what Google does is a fair use?</p> <p>14 MR. McGOWAN: Objection, misstates.</p> <p>15 You may answer.</p> <p>16 A. My analysis is neither assuming, nor</p> <p>17 expressing an opinion about what Google does.</p> <p>18 It's about what whether Google does is a fair</p> <p>19 use.</p> <p>20 My analysis is simply stating that</p> <p>21 the usage of the copyrighted works for the</p> <p>22 production of Google Books, is a complement,</p> <p>23 rather than a substitute for the sale of the</p> <p>24 book.</p> <p>25 So the search is a complement to the</p>	<p style="text-align: right;">Page 153</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 in the Partner Program. I think there could be</p> <p>3 examples of not-in-print Books that are</p> <p>4 publishers, who are members of the Partner</p> <p>5 Program.</p> <p>6 So, for example, if they do, if</p> <p>7 there's a link to a, there's a print-on-demand</p> <p>8 feature, such a thing.</p> <p>9 I believe it's not necessarily the</p> <p>10 case that a member of the Partner Program is</p> <p>11 providing in-print books.</p> <p>12 Q. You don't consider a print-on-demand</p> <p>13 book to be in print?</p> <p>14 A. I don't know if a book that can be</p> <p>15 printed on demand, would count as in print from</p> <p>16 the perspective of the contract between the</p> <p>17 publisher and the author, in all circumstances.</p> <p>18 I simply cannot say that all of the</p> <p>19 books, that all of the publishers in the Partner</p> <p>20 Program, that a hundred percent of what they've</p> <p>21 put in the Partner Program is an in-print book.</p> <p>22 Q. Let's use the term commercially</p> <p>23 available, instead of in print, to eliminate</p> <p>24 that ambiguity.</p> <p>25 Do you have any information that</p>

<p style="text-align: right;">Page 154</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Books that are not commercially available, are</p> <p>3 available in the Partner Program?</p> <p>4 A. Well, so I believe that, so my -- I</p> <p>5 think, in general, the books in the Partner</p> <p>6 Program will be commercially available.</p> <p>7 I believe it to be the case, though</p> <p>8 I'm not certain that there may be</p> <p>9 print-on-demand books or printable books in the</p> <p>10 Partner Program that are, that you don't, that</p> <p>11 are in copyright, but you don't -- but the</p> <p>12 publisher has decided to make them available</p> <p>13 without pay. I believe such things exist in the</p> <p>14 Partner Program.</p> <p>15 Q. That's based on?</p> <p>16 A. So the reason I am hesitant, I -- so</p> <p>17 for example, I have a number of works that</p> <p>18 appear when you search me in Google Books, and</p> <p>19 those are National Bureau of Economic Research</p> <p>20 working papers.</p> <p>21 And those works are in copyright, and</p> <p>22 I believe the National -- I believe, though I</p> <p>23 have not checked, that the National Bureau of</p> <p>24 Economic Research just let's you print them,</p> <p>25 since their primarily goal is dissemination. I</p>	<p style="text-align: right;">Page 156</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 function is assisting individuals find</p> <p>3 marketing. I do not know whether he represents</p> <p>4 any out-of-print books.</p> <p>5 Q. What about Mr. Zohn and his company</p> <p>6 William Morris, do you know if they represent</p> <p>7 out-of-print books?</p> <p>8 MR. MCGOWAN: Objection, vague.</p> <p>9 Maybe you didn't mean authors.</p> <p>10 MS. ZACK: Books of authors.</p> <p>11 Q. They represent authors. Do they</p> <p>12 represent authors with respect to books that are</p> <p>13 out of print?</p> <p>14 A. They represent authors. I do not</p> <p>15 know for a fact whether or not those authors</p> <p>16 have out-of-print books.</p> <p>17 Q. Referring to page 13 of your report.</p> <p>18 I guess -- sorry, it carries over from page 12.</p> <p>19 Paragraph 43, talks about iUniverse</p> <p>20 back in print.</p> <p>21 Did you look at any other</p> <p>22 back-in-print programs other than iUniverse?</p> <p>23 A. No, I did not.</p> <p>24 Q. IUniverse makes books available for</p> <p>25 sale for authors; right?</p>
<p style="text-align: right;">Page 155</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 would have to double check that.</p> <p>3 Q. Do you know if they're in through the</p> <p>4 Partner Program?</p> <p>5 A. I think so. They're in copyright,</p> <p>6 and I believe the full text appears.</p> <p>7 Q. So you think so, but you're not sure?</p> <p>8 A. I think so, but I'm not sure. I</p> <p>9 would be hesitant to, therefore, say</p> <p>10 categorically that all books in the Partner</p> <p>11 Program are commercially available.</p> <p>12 Q. Would you say that the vast majority</p> <p>13 are?</p> <p>14 MR. MCGOWAN: Objection, vague.</p> <p>15 You may answer.</p> <p>16 A. I would, I would I assume that the</p> <p>17 majority of the books in the Partner Program are</p> <p>18 commercially available.</p> <p>19 Q. In footnote 47, you talk about</p> <p>20 Richard Lowry's book, The Gulf War Chronicles,</p> <p>21 and that's an in-print book; right?</p> <p>22 A. Yes, I believe so.</p> <p>23 Q. Do you know whether Mr. Harris</p> <p>24 represents any out-of-print books?</p> <p>25 A. I do -- well, Mr. Harris's primary</p>	<p style="text-align: right;">Page 157</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Yes, my understanding is that</p> <p>3 back-in-print program makes, allows, yeah, makes</p> <p>4 books available for sale that were out of print,</p> <p>5 yeah.</p> <p>6 Q. Pursuant to contracts with copyright</p> <p>7 holders; correct?</p> <p>8 A. Yes, authors must choose to be part</p> <p>9 of the program.</p> <p>10 Q. Right, authors who have the right to,</p> <p>11 as a copyright owner; right?</p> <p>12 A. Correct.</p> <p>13 Q. The contract provides for royalties;</p> <p>14 correct?</p> <p>15 A. My understanding is that if consumers</p> <p>16 buy books from iUniverse, yes, the author gets</p> <p>17 royalties.</p> <p>18 Q. Part of that is authors can then</p> <p>19 permit portions of their book to be viewed in</p> <p>20 order to spur sales; correct?</p> <p>21 A. Authors can choose to have parts of</p> <p>22 their book browsable, so that, in order to</p> <p>23 encourage sales.</p> <p>24 Q. If there is a sale, iUniverse</p> <p>25 provides a royalty to the author; correct?</p>

<p style="text-align: right;">Page 158</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection, form.</p> <p>3 You may answer.</p> <p>4 A. My understanding is that if there's a</p> <p>5 sale, iUniverse provides a royalty to the</p> <p>6 author.</p> <p>7 Q. Referring you to paragraph 46, you</p> <p>8 say, "A related benefit of the search capability</p> <p>9 of Google Books is its ability to increase</p> <p>10 interest in and sales of books that may be</p> <p>11 relatively unknown, rare, or out-of-print.</p> <p>12 Research on the effect of the Internet supports</p> <p>13 the theory of a "long tail" or the creation of</p> <p>14 marketplaces where buyers and sellers, who</p> <p>15 otherwise would not find each other, can meet."</p> <p>16 And you say, "I expect that Google</p> <p>17 Books has the same effect."</p> <p>18 Do you have any empirical evidence to</p> <p>19 back that up?</p> <p>20 A. So empirical evidence to back up that</p> <p>21 consumers can find books through Google Books or</p> <p>22 empirical evidence that they, that they will buy</p> <p>23 used books, that they have bought used books as</p> <p>24 an outcome of that?</p> <p>25 I do not have any -- I have not done</p>	<p style="text-align: right;">Page 160</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 record. So, you know, first, for example, in</p> <p>3 the depositions of the named plaintiffs, they do</p> <p>4 not cite any evidence that Google Books is a</p> <p>5 substitute for the purchase of the book, that</p> <p>6 using Google Books as a substitute for the</p> <p>7 purchase of the books.</p> <p>8 Mr. Aiken, in his deposition, says</p> <p>9 that it is his belief, and he's an expert in the</p> <p>10 industry, that Google Books, the Google Book</p> <p>11 search function on net is a compliment to the</p> <p>12 sale of the books.</p> <p>13 And the, I might add, you know, the</p> <p>14 various, of course, these aren't a random</p> <p>15 sample, but I don't know where I would obtain</p> <p>16 one, the, you know, testimonials that I cite</p> <p>17 from the Google Books website, describe authors,</p> <p>18 you know, have discussions of authors who view</p> <p>19 the Google Books project as a complement to the</p> <p>20 sale of their books.</p> <p>21 So I'm, I haven't seen anything in</p> <p>22 the record, provided by the plaintiffs, to</p> <p>23 suggest that the snippets provided by Google</p> <p>24 Books are substitutes for the sale of the book.</p> <p>25 Q. Well, the -- you referred to author</p>
<p style="text-align: right;">Page 159</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 any empirical analysis of the sales of books</p> <p>3 that were on Google Books.</p> <p>4 Q. Can you provide me an example where</p> <p>5 there's been a marketplace created where a</p> <p>6 particular buyer and a particular seller found</p> <p>7 each other after using Google Books concerning</p> <p>8 an out-of-print book?</p> <p>9 MR. McGOWAN: Object to form.</p> <p>10 You may answer.</p> <p>11 A. No, I don't have any data about that.</p> <p>12 MR. McGOWAN: I will note for the</p> <p>13 record, I think a fire alarm went off.</p> <p>14 Off the record.</p> <p>15 (Discussion off the record.)</p> <p>16 Q. Paragraph 47 on page 14, you say,</p> <p>17 "While I do find substantial evidence that</p> <p>18 Google Books is a complement to the purchase of</p> <p>19 a book and thus, should stimulate book sales, I</p> <p>20 have not found evidence that Google Books</p> <p>21 searches are a substitute for the purchase of</p> <p>22 books."</p> <p>23 So where did you look for the</p> <p>24 evidence?</p> <p>25 A. So I think the resources are in the</p>	<p style="text-align: right;">Page 161</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 endorsements on Google Books.</p> <p>3 Were those endorsements of snippets</p> <p>4 or Partner Program books?</p> <p>5 A. So there, so for example, Mr., Mr. --</p> <p>6 sorry, Mr. Lowry, my understanding from his</p> <p>7 snippets, from his discussion, is that after his</p> <p>8 book appeared in Google Books as part of the</p> <p>9 Library Program, the sales increased.</p> <p>10 But I, the description there may not</p> <p>11 have been in, you know, entirely complete. So I</p> <p>12 believe what I said is exactly right, I have not</p> <p>13 seen any evidence that snippets have served as a</p> <p>14 substitute for the book.</p> <p>15 Q. Have you done any -- but you haven't</p> <p>16 done any empirical analysis where you've</p> <p>17 identified certain books that are available in</p> <p>18 snippet view, and then any research about their</p> <p>19 sales?</p> <p>20 A. So since I don't have any access to</p> <p>21 data about the sales of books, I can't do that.</p> <p>22 Q. Where would you, where would you get</p> <p>23 access to data about the sales of books?</p> <p>24 A. Well, I mean I, for -- I mean I</p> <p>25 could, I think it would be a difficult, if not</p>

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 2 impossible project, nonetheless.
 3 But, for example, if one had, you
 4 know, access to Amazon data, there may be things
 5 that one could do.

6 Q. Any other data that you can think of?

7 A. I think similarly, if you had access
 8 to, you know -- well, I think Amazon data would
 9 be probably the primary or best source, but
 10 there could be other, you know, other book
 11 sellers' data.

12 Q. You don't have access to that because
 13 it hasn't been provided to you by Google or any

16 compound.

17 You may answer.

18 A. So, I don't have access to Amazon's
 19 proprietary data.

20 Q. Referring you to paragraph 48, you
 21 say, "A related question to the one discussed
 22 above is whether, in the absence of Google
 23 Books, a market might have arisen in which
 24 authors stood to benefit in ways they do not
 25 currently."

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1 J.A. Chevalier - CONFIDENTIAL

2 Did you consider any markets for
 3 collective licensing for digitization of books?

4 MR. McGOWAN: Objection, foundation.

5 You may answer.

6 A. So as I discuss in the report, I
 7 considered, I considered markets for licensing
 8 of -- I observed that authors have been paid in
 9 situations in which books were digitized for the
 10 purpose of allowing, using, displaying to users
 11 the full text of the book, but I have not seen
 12 an example where firms pay authors for the right
 13 to scan and index their work.

14 Q. There is, albeit, as you have said, a
 15 small amount of revenue, but there is a revenue
 16 component to the Partner Program; correct?

17 A. There is a revenue component to the
 18 Partner Program.

19 Q. Have you looked at other collective
 20 licenses for other copyrighted content --

21 MR. McGOWAN: Objection, foundation.

22 Q. -- to determine how those collective
 23 licenses operate?

24 A. So can you be more specific?

25 Q. Did you do any research concerning

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1 J.A. Chevalier - CONFIDENTIAL

2 the Copyright Clearance Center, for instance?

3 A. So, I have a, I have a familiarity
 4 with that Copyright Clearance Center. That
 5 Copyright Clearance Center is in the category of
 6 entities that I describe in my report that
 7 provides more than snippets, that provide users
 8 with not full text, like chapters, something
 9 like chapters of work.

10 So that is in the category of works
 11 that I describe -- of licensing scenarios that I
 12 describe and report in my report as dissimilar
 13 to the services provided by Google Books.

14 Q. What would you consider to be a
 15 similar licensing service, if any, to licensing
 16 of snippets?

17 MR. McGOWAN: Objection, foundation.

18 You may answer.

19 A. So there are commercial entities that
 20 provide indexing functions and searchability --
 21 some index and search functions.

22 They are different from Google Books,
 23 but such entities, you know, serve a somewhat
 24 similar function to users, and I have not found
 25 any examples of such entities that pay the

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2 authors to index their work.

3 Q. Have you found evidence where
 4 entities have paid for indexes?

5 MR. McGOWAN: Objection, vague.

6 You may answer.

7 A. So is the indexing -- are there
 8 entities that, that want to purchase indexes?

9 Q. Um-hmm.

10 A. Yes.

11 Q. Can you give me some examples of
 12 that?

13 A. So for example, I was a member of the
 14 American Economic Association Executive
 15 Committee.

16 The American Economic Association
 17 creates a product called Econlit. Econlit is a
 18 product where a human being reads -- I would
 19 have used the word scan, but that might be
 20 confusing in this context.

21 A human being reads economics
 22 articles, writes down key words, and the product
 23 that is sold to libraries is a searchable index
 24 of those key words.

25 Q. So the library pays for the index?

42 (Pages 162 - 165)

<p style="text-align: right;">Page 166</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. The library pays for the index.</p> <p>3 Q. Have you heard of Marc Indexing for</p> <p>4 libraries?</p> <p>5 A. I have heard of that.</p> <p>6 Q. Do you know whether or not libraries</p> <p>7 pay for that?</p> <p>8 A. My understanding is that libraries</p> <p>9 pay for that.</p> <p>10 Q. In the area of music, would you</p> <p>11 consider a ring tone to be analogous to a</p> <p>12 snippet?</p> <p>13 MR. McGOWAN: Objection, vague.</p> <p>14 You may answer.</p> <p>15 A. No, I wouldn't consider a ring tone</p> <p>16 to be analogous to a snippet.</p> <p>17 Q. Why not? I meant a snippet from a</p> <p>18 book.</p> <p>19 A. Yes, I think a ring tone is a --</p> <p>20 well, I have not analyzed the market for ring</p> <p>21 tones, but I would say that snippet is a de</p> <p>22 minimis fraction of the total book, and that a</p> <p>23 ring tone is not.</p> <p>24 Q. On what basis do you say that one is</p> <p>25 de minimis and one isn't?</p>	<p style="text-align: right;">Page 168</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 BY MS. ZACK:</p> <p>3 Q. Back to page 14.</p> <p>4 A. Okay.</p> <p>5 Q. In paragraph 49 you state, "The</p> <p>6 underlying premise of any hypothetical market</p> <p>7 runs counter to the basic economics of this</p> <p>8 industry outlined above - there is no reason to</p> <p>9 expect that a market would arise between</p> <p>10 copyright holders (as sellers) and Google (as</p> <p>11 the buyer), when, as discussed above, it is the</p> <p>12 copyright holder who is benefitting from the use</p> <p>13 of the copyrighted material."</p> <p>14 Are you taking the position that</p> <p>15 Google does not benefit from the use of the</p> <p>16 copyrighted material?</p> <p>17 A. No, so Google clearly uses the</p> <p>18 copyrighted material as an input to its product.</p> <p>19 Just as, you know, other indexers who sell</p> <p>20 indexes, use the material as an input to their</p> <p>21 products.</p> <p>22 So, and then they sell that product</p> <p>23 or in Google's case, advertise around that</p> <p>24 product. So I'm not taking the position that</p> <p>25 Google does not benefit.</p>
<p style="text-align: right;">Page 167</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. The snippet is, given the number of</p> <p>3 snippets that are displayed for a user, the</p> <p>4 snippet is a small fraction of the total book.</p> <p>5 And I have not studied the market for</p> <p>6 ring tones, but, you know, I have heard ring</p> <p>7 tones, and ring tones are recognizable chunks of</p> <p>8 a song.</p> <p>9 Q. Do you know whether there's a market</p> <p>10 for licenses for ring tones?</p> <p>11 A. I believe there is a market for</p> <p>12 licenses for ring tones.</p> <p>13 Q. Where do you have that information --</p> <p>14 what is the basis for that belief?</p> <p>15 A. I believe that I have read in the,</p> <p>16 you know, press that there's a market for ring</p> <p>17 tones. But I don't know much about it.</p> <p>18 MR. McGOWAN: If you wouldn't mind</p> <p>19 taking a very short break when you're done</p> <p>20 with this line, that would be useful.</p> <p>21 MS. ZACK: Sure. Let me just see</p> <p>22 where I am. We can take a break now, if you</p> <p>23 want.</p> <p>24 (Brief recess taken.)</p> <p>25 FURTHER EXAMINATION</p>	<p style="text-align: right;">Page 169</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. So you agree that Google does benefit</p> <p>3 from the use of the copyrighted materials?</p> <p>4 MR. McGOWAN: Objection, vague.</p> <p>5 You may answer.</p> <p>6 A. So Google, you know, Google, Google</p> <p>7 benefits from the use of the copyrighted</p> <p>8 materials, in that they use the copyrighted</p> <p>9 materials as an input to the product.</p> <p>10 Q. You believe that Google benefits from</p> <p>11 the product; right?</p> <p>12 MR. McGOWAN: Objection, vague.</p> <p>13 You may answer.</p> <p>14 A. So I believe that Google, I believe</p> <p>15 that Google, on net, benefits from continuing to</p> <p>16 offer the product.</p> <p>17 Q. Have you discussed with anyone from</p> <p>18 Google whether or not Google would pay for the</p> <p>19 product if they -- for the copyrighted</p> <p>20 materials, if they were required to by the</p> <p>21 Doctrine of Fair Use?</p> <p>22 MR. McGOWAN: What?</p> <p>23 MS. ZACK: I'll restate it.</p> <p>24 Q. Have you discussed with anyone from</p> <p>25 Google whether they would pay for the</p>

43 (Pages 166 - 169)

<p style="text-align: right;">Page 170</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 copyrighted material, if it was determined that</p> <p>3 they could not use it under the Copyright Act</p> <p>4 without a license?</p> <p>5 MR. McGOWAN: Vague.</p> <p>6 You may answer.</p> <p>7 A. Okay, so as I said before, I have not</p> <p>8 entered into conversations with executives at</p> <p>9 Google.</p> <p>10 Q. You don't really have a full</p> <p>11 understanding of how Google benefits from the</p> <p>12 use of the copyrighted materials; do you?</p> <p>13 MR. McGOWAN: Objection, vague.</p> <p>14 You may answer. Foundation.</p> <p>15 You may answer.</p> <p>16 A. I understand the types of ways in</p> <p>17 which Google benefits from the use of the</p> <p>18 copyrighted materials, but I don't -- I can't</p> <p>19 add up the benefit to Google of the use of the</p> <p>20 copyrighted materials.</p> <p>21 Q. Well, you haven't, you don't fully</p> <p>22 understand how they use all the materials that</p> <p>23 they accumulate in their search engine to</p> <p>24 benefit their business; right?</p> <p>25 MR. McGOWAN: Objection, vague.</p>	<p style="text-align: right;">Page 172</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 conclusion that no alternative market would</p> <p>3 arise for payment for the indexing functions,</p> <p>4 derives from my, from, from a few things.</p> <p>5 One piece is that the substantial</p> <p>6 benefit that the copyright holder gets from</p> <p>7 being indexed.</p> <p>8 And the second is that I am not aware</p> <p>9 of other markets in which index service --</p> <p>10 indexing services are provided where the author</p> <p>11 or publisher is paid for being included in that</p> <p>12 indexing service.</p> <p>13 Q. Well, Google Books is more about just</p> <p>14 indexing, it's also about digitizing entire</p> <p>15 books; right?</p> <p>16 MR. McGOWAN: Objection, vague.</p> <p>17 You may answer.</p> <p>18 A. I understand that books are</p> <p>19 digitized. The word digitized for it to create</p> <p>20 Google Books.</p> <p>21 Q. Do you know whether or not Google</p> <p>22 makes other use of the digitized books beyond</p> <p>23 merely indexing them?</p> <p>24 MR. McGOWAN: Same objection.</p> <p>25 You may answer.</p>
<p style="text-align: right;">Page 171</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 You may answer.</p> <p>3 A. So I do not know all of the -- I do</p> <p>4 not all -- I cannot catalog all of the benefits</p> <p>5 to Google of their, of providing the search</p> <p>6 functionality.</p> <p>7 Q. Have you looked at their public</p> <p>8 documents?</p> <p>9 A. I've looked at a number of Google</p> <p>10 public documents.</p> <p>11 Q. Have you looked at their 10-K?</p> <p>12 A. I have not looked at their 10-K's</p> <p>13 pursuant to this matter.</p> <p>14 Q. Have you looked at any of their</p> <p>15 earning statements?</p> <p>16 A. I have not looked at their earning</p> <p>17 statements pursuant to this matter.</p> <p>18 Q. So your statement that there is no</p> <p>19 reason to expect that a market would arise</p> <p>20 between the copyright holders and Google because</p> <p>21 the copyright holders benefit, discounts the</p> <p>22 fact that Google also benefits?</p> <p>23 MR. McGOWAN: Objection, vague.</p> <p>24 You may answer.</p> <p>25 A. So as I describe in the report, my</p>	<p style="text-align: right;">Page 173</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. So I don't know whether they have</p> <p>3 used the books for some other purpose, outside</p> <p>4 of the Google Books Project.</p> <p>5 Q. You don't know one way or the other?</p> <p>6 A. I don't know whether they have made</p> <p>7 use of the books for some purpose other than the</p> <p>8 Google Books project.</p> <p>9 Q. So you don't know whether they've</p> <p>10 used the digitized books for purposes of</p> <p>11 improving their general search engine?</p> <p>12 MR. McGOWAN: Objection, vague.</p> <p>13 You may answer.</p> <p>14 A. I don't know whether they have used</p> <p>15 the books for a purpose other than providing the</p> <p>16 Google Books project.</p> <p>17 Q. You don't consider that relevant to</p> <p>18 your analysis?</p> <p>19 A. I don't consider that relevant to my</p> <p>20 analysis.</p> <p>21 Q. You say at the end, "I have seen no</p> <p>22 evidence that any firm has paid, for example,</p> <p>23 for permission to display snippets"?</p> <p>24 A. Correct.</p> <p>25 Q. Are you talking about in search</p>

<p style="text-align: right;">Page 174</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 engines or anywhere?</p> <p>3 A. I'm talking about in general.</p> <p>4 Q. Are you familiar with the market for</p> <p>5 permissions for display of portions of books in</p> <p>6 other copyrighted books and other matter?</p> <p>7 MR. McGOWAN: Objection, foundation,</p> <p>8 vague.</p> <p>9 You may answer.</p> <p>10 A. Sorry, can you be more specific?</p> <p>11 Q. Sure. Are you familiar at all with</p> <p>12 the concept that if excerpts are used from one</p> <p>13 book, copyrighted book, and either another book</p> <p>14 or television or something like that, that</p> <p>15 permission fees are paid?</p> <p>16 MR. McGOWAN: Objection, foundation.</p> <p>17 You may answer.</p> <p>18 A. So, for example, so I haven't studied</p> <p>19 that.</p> <p>20 Q. Were you aware that that market</p> <p>21 existed?</p> <p>22 MR. McGOWAN: Objection, foundation.</p> <p>23 You can answer.</p> <p>24 A. I think it depends on the extent of</p> <p>25 the market. So, for example, I know that</p>	<p style="text-align: right;">Page 176</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 MR. McGOWAN: Objection. Incomplete</p> <p>3 hypothetical.</p> <p>4 You may answer.</p> <p>5 A. Would my opinion about what change?</p> <p>6 Q. You said it was de minimis?</p> <p>7 A. So if -- I said it was de minimus for</p> <p>8 what purpose. So would my opinion about what</p> <p>9 section of my report change, if snippets were</p> <p>10 more than three lines?</p> <p>11 Q. Any section of your report.</p> <p>12 A. So if a snippet were 10 lines, I</p> <p>13 don't think there's any section of my report</p> <p>14 where my conclusions would change.</p> <p>15 Q. Is there some amount of lines where</p> <p>16 you can pick -- conclusions would change?</p> <p>17 A. As I've said in my report, I know</p> <p>18 that the amount of text that Google displays,</p> <p>19 under the Library Program, is smaller than the</p> <p>20 amount of text that appears to be chosen by</p> <p>21 publishers and authors to display in standard</p> <p>22 commercial use.</p> <p>23 So to the extent that that's true, my</p> <p>24 conclusions would remain the same.</p> <p>25 Q. Do you think there's a market for</p>
<p style="text-align: right;">Page 175</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 permission fees are paid for the inclusion of</p> <p>3 chapters of books in my course packet.</p> <p>4 Q. Do you know whether permission fees</p> <p>5 are sometimes paid for quotes that are included</p> <p>6 in books, you know, at the beginning of, above</p> <p>7 like chapter one, where there's a quote, do you</p> <p>8 know if permission fees are ever paid for that</p> <p>9 type of citation?</p> <p>10 MR. McGOWAN: Objection, foundation.</p> <p>11 You may answer.</p> <p>12 A. I don't know the answer to that.</p> <p>13 Q. Your definition of snippets is, as</p> <p>14 you previously stated, just three lines?</p> <p>15 MR. McGOWAN: Objection. Misstates,</p> <p>16 asked and answered.</p> <p>17 You can answer.</p> <p>18 MS. ZACK: I don't want to misstate.</p> <p>19 A. So my understanding is -- oh, I'm</p> <p>20 using the term snippets here to describe very</p> <p>21 short sections of text which, you know, in the</p> <p>22 case of the Google Books, is roughly three</p> <p>23 lines.</p> <p>24 Q. If snippets are 10 lines, would your</p> <p>25 opinion change?</p>	<p style="text-align: right;">Page 177</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 digital copies of books?</p> <p>3 MR. McGOWAN: Objection, vague.</p> <p>4 You may answer.</p> <p>5 A. So what do you mean do I think</p> <p>6 there's a market for digital copies of books?</p> <p>7 Q. A market in which someone would pay</p> <p>8 for digital copies of books.</p> <p>9 A. Do I think a market exists or could</p> <p>10 exist?</p> <p>11 Q. Either. Well, does it exist?</p> <p>12 A. So I think, you know, ebooks are</p> <p>13 bought and sold, so I think, you know, I would</p> <p>14 say that there's a market for digitized books.</p> <p>15 Q. So there's currently a market for</p> <p>16 digitized books?</p> <p>17 MR. McGOWAN: Objection, vague.</p> <p>18 You may answer.</p> <p>19 A. If I think ebooks are digitized</p> <p>20 books, I think there's a markets for ebooks.</p> <p>21 Q. I mean Google's currently selling</p> <p>22 ebooks; right?</p> <p>23 A. Yeah, you can -- you mean the books</p> <p>24 that you can purchase via Google Play? Is that</p> <p>25 what you mean?</p>

<p style="text-align: right;">Page 178</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. I'm asking you whether Google's</p> <p>3 currently selling ebooks?</p> <p>4 A. So okay --</p> <p>5 Q. It could be a yes-or-no answer.</p> <p>6 A. Okay, fine. All right, okay, I</p> <p>7 wasn't sure what you were referring to.</p> <p>8 Yes, my understanding is you can buy</p> <p>9 ebooks through Google Play.</p> <p>10 Q. You understand that libraries buy</p> <p>11 ebooks too; right?</p> <p>12 A. I understand that libraries sometimes</p> <p>13 buy ebooks, yes.</p> <p>14 Q. When Google digitized its books in</p> <p>15 the Library Program, it didn't pay the copyright</p> <p>16 owners for that right; did it?</p> <p>17 MR. McGOWAN: Objection to the extent</p> <p>18 it calls for a legal conclusion.</p> <p>19 You may answer.</p> <p>20 A. So my understanding is that when</p> <p>21 Google digitized books as part of the Library</p> <p>22 Program, it did not pay authors or publishers</p> <p>23 for the, for the scanning.</p> <p>24 Q. I previously asked you about</p> <p>25 collective licensing, and I asked you about the</p>	<p style="text-align: right;">Page 180</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. You say they "arose as a solution to</p> <p>3 the problems of widely, disbursed rights holders</p> <p>4 and widely disbursed music users."</p> <p>5 A. Correct.</p> <p>6 Q. With respect to Google Books, are</p> <p>7 there widely disbursed rights holders?</p> <p>8 A. There are widely disbursed rights</p> <p>9 holders.</p> <p>10 Q. Are there widely disbursed users of</p> <p>11 Google Books?</p> <p>12 A. So here I'm referring to the entity</p> <p>13 that -- not the end user, but the entity that</p> <p>14 would, that is making use of the license.</p> <p>15 And so in the music case, the music</p> <p>16 users were widely disbursed. But in the Google</p> <p>17 Books case, Google Books is a single entity.</p> <p>18 It's not widely disbursed.</p> <p>19 Q. So here you are saying the music</p> <p>20 users are like restaurants, etcetera?</p> <p>21 A. Correct.</p> <p>22 Q. This is all about performance rights?</p> <p>23 A. This discussion is about performance</p> <p>24 rights.</p> <p>25 MS. ZACK: Let's mark as the next</p>
<p style="text-align: right;">Page 179</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 CCC.</p> <p>3 Are you aware of any other collective</p> <p>4 licensing organizations? Are you familiar with</p> <p>5 any?</p> <p>6 A. Do you mean collective licenses</p> <p>7 organizations for books?</p> <p>8 Q. For copyrighted material.</p> <p>9 A. So I have some familiarity, as you</p> <p>10 know, as I said I've I disclosed some work for</p> <p>11 SESAC, and I have some familiarity with</p> <p>12 licensing of performance rights for music.</p> <p>13 But music licensing is very</p> <p>14 complicated, and I've only worked on narrow</p> <p>15 portions of it. So I have some familiarity with</p> <p>16 it, but --</p> <p>17 Q. What about licensing for music</p> <p>18 lyrics, as opposed to performance rights?</p> <p>19 A. I'm not familiar with that market, if</p> <p>20 it exists.</p> <p>21 Q. In paragraph -- I'm sorry, footnote</p> <p>22 63 on page 15?</p> <p>23 A. Um-hmm, yes.</p> <p>24 Q. You do talk about ASCAP and BMI?</p> <p>25 A. I do.</p>	<p style="text-align: right;">Page 181</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 exhibit, a series of pages from the Internet</p> <p>3 concerning the acquisition by Google of</p> <p>4 Rightsflow.</p> <p>5 (Defendant's Exhibit 97, a series of</p> <p>6 pages from the Internet concerning the</p> <p>7 acquisition by Google of Rightsflow,</p> <p>8 marked for identification, as of this</p> <p>9 date.)</p> <p>10 Q. Are you familiar with Rightsflow?</p> <p>11 A. No.</p> <p>12 Q. Or Google's acquisition of this</p> <p>13 collective licensing company?</p> <p>14 A. No.</p> <p>15 Q. If you look at the second page of</p> <p>16 this document, it says -- the second page,</p> <p>17 second paragraph, "The acquisition gives</p> <p>18 video-sharing service YouTube access to</p> <p>19 technology to help it manage its relationship</p> <p>20 with one of the most fragmented and unwieldy</p> <p>21 parts of the music industry: Music publishing.</p> <p>22 Music publishing concerns the copyrights on</p> <p>23 songs' lyrics and melodies, as distinct from a</p> <p>24 particular recording of a given song."</p> <p>25 Do you see that?</p>

<p style="text-align: right;">Page 182</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. Yes.</p> <p>3 Q. So you were not aware, prior to now,</p> <p>4 that there was a -- there is a collective</p> <p>5 licensing organization for copyrighted lyrics?</p> <p>6 MR. McGOWAN: Objection. Misstates.</p> <p>7 A. So as I read this, it says, "Music</p> <p>8 publishing concerns the copyrights on songs'</p> <p>9 lyrics and melodies, as distinct from a</p> <p>10 particular recording of a given song."</p> <p>11 My understanding is that, my</p> <p>12 understanding of your previous question was</p> <p>13 performance rights are also rights for -- that</p> <p>14 flow to the composer and lyricist of the song.</p> <p>15 Those are composer's rights. So I</p> <p>16 don't, I -- from what I read here, I don't know</p> <p>17 this to be different than what I described.</p> <p>18 It may be, but I don't know this to</p> <p>19 be different than what I described ASCAP and BMI</p> <p>20 to be.</p> <p>21 Q. Would you agree that the collective</p> <p>22 licensing has developed in response to changes</p> <p>23 in technology?</p> <p>24 MR. McGOWAN: Objection, vague.</p> <p>25 You may answer.</p>	<p style="text-align: right;">Page 184</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 other?</p> <p>3 A. Correct.</p> <p>4 Q. Have you looked at any of the</p> <p>5 licenses available from Copyright Clearance</p> <p>6 Center?</p> <p>7 MR. McGOWAN: Objection, foundation.</p> <p>8 Q. In connection with this assignment?</p> <p>9 MR. McGOWAN: Objection, foundation.</p> <p>10 You may answer.</p> <p>11 A. I have not looked at licenses from</p> <p>12 Copyright Clearance Center.</p> <p>13 Q. Have you looked at licenses from any</p> <p>14 other organization in connection with this</p> <p>15 assignment?</p> <p>16 A. I think the list of materials I have</p> <p>17 is complete. I have not looked at other</p> <p>18 licenses that are not referenced here.</p> <p>19 Q. If a license for book digitization</p> <p>20 developed a collective license, would that be a</p> <p>21 new good?</p> <p>22 MR. McGOWAN: Objection, vague.</p> <p>23 You may answer.</p> <p>24 A. So what do you mean by a collective</p> <p>25 license for book digitization?</p>
<p style="text-align: right;">Page 183</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. As I described in my report,</p> <p>3 collective, the collective licensing that we</p> <p>4 observe in music -- well, this is, this is a new</p> <p>5 entity by which I don't know anything.</p> <p>6 But the description that I gave of</p> <p>7 the music rights organizations, that collective</p> <p>8 licensing process is a very old process.</p> <p>9 Q. When you say, "very old," how old are</p> <p>10 you talking about?</p> <p>11 A. Well, I don't remember precisely, but</p> <p>12 my recollection is, you know, dates from Tin Pan</p> <p>13 Alley in the 1920's.</p> <p>14 Q. Do you have any information about</p> <p>15 whether or not different types of licenses have</p> <p>16 been developed as new technologies have come</p> <p>17 into existence?</p> <p>18 MR. McGOWAN: Objection, vague.</p> <p>19 You may answer.</p> <p>20 A. The performance license that I</p> <p>21 describe, I believe, incorporates new</p> <p>22 technologies, but I do not know about the</p> <p>23 development of new types of licenses. That may</p> <p>24 exist, but I haven't studied it.</p> <p>25 Q. So you don't know one way or the</p>	<p style="text-align: right;">Page 185</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. A license where various rights</p> <p>3 holders give an intermediary the right to</p> <p>4 license all or portions of their work to third</p> <p>5 parties.</p> <p>6 A. So if you mean an organization where</p> <p>7 existing rights holders contribute their works</p> <p>8 in order for those works to be jointly licensed,</p> <p>9 I don't believe that that would be a new good</p> <p>10 under the definition I've proffered, because a</p> <p>11 new good serves a previously unmet or poorly met</p> <p>12 need.</p> <p>13 Q. So it could be a new product, but not</p> <p>14 a new good?</p> <p>15 A. I believe an amalgamation of -- an</p> <p>16 amalgamation of opt-in rights holders who have</p> <p>17 come together to form an organization, would not</p> <p>18 really constitute a new good because it doesn't,</p> <p>19 it doesn't particularly meet an unmet need.</p> <p>20 So it would be a product. It would</p> <p>21 be a product, but it wouldn't substantially meet</p> <p>22 an unmet need.</p> <p>23 Q. When you say, "It wouldn't meet an</p> <p>24 unmet need," from whose perspective would it not</p> <p>25 meet an unmet need?</p>

<p style="text-align: right;">Page 186</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. So as I describe in the report, as</p> <p>3 I've discussed, locating rights holders is a</p> <p>4 very, you know, as Dr. St. Clair reports,</p> <p>5 locating rights holders is a very difficult and</p> <p>6 costly process.</p> <p>7 If you're referring to an</p> <p>8 organization where book rights holders, you</p> <p>9 know, provide, you know, register or provide</p> <p>10 their books, I think there are already, I think</p> <p>11 there are already mechanisms in the marketplace</p> <p>12 for book rights holders who want to, you know,</p> <p>13 who want to -- I don't, I think the problem is</p> <p>14 the rights holders who cannot be found, largely</p> <p>15 speaking, or the rights holders who, the orphan</p> <p>16 works problem.</p> <p>17 And the thing you're describing to me</p> <p>18 does not solve the orphan works problem.</p> <p>19 Sorry, I don't, I cannot, since I</p> <p>20 can't tell you whose need would be met, it's</p> <p>21 hard for me to tell you why it doesn't fill an</p> <p>22 unmet need.</p> <p>23 The product you describe, I can't, I</p> <p>24 cannot figure out whose need would be met by</p> <p>25 that product.</p>	<p style="text-align: right;">Page 188</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 how an entity that relies on the active</p> <p>3 depository of rights with it, would solve unmet</p> <p>4 needs of libraries in the short run.</p> <p>5 Q. I'm not just talking about libraries.</p> <p>6 What about unmet needs of Google, if</p> <p>7 that was the only way it could get the books?</p> <p>8 MR. McGOWAN: Objection, incomplete</p> <p>9 hypothetical, foundation.</p> <p>10 You may answer.</p> <p>11 A. So I guess I -- in this case, as</p> <p>12 opposed to the case I cite in the footnote, I</p> <p>13 don't quite see the service -- that the source</p> <p>14 of the efficiencies are not apparent to me.</p> <p>15 Q. Well, AMCAP and BMI -- ASCAP, excuse</p> <p>16 me, and BMI, were created because the rights</p> <p>17 holders had a legal copyright interest; correct?</p> <p>18 MR. McGOWAN: Objection, foundation.</p> <p>19 You may answer.</p> <p>20 A. So my understanding is that ASCAP and</p> <p>21 BMI arose -- yes, so the rights holders, yeah,</p> <p>22 the composers, mostly, yes, or the rights</p> <p>23 holders, yes, as I say in my report.</p> <p>24 Q. Right, so it's not just that there</p> <p>25 were problems of widely disbursed rights holders</p>
<p style="text-align: right;">Page 187</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 Q. Well, what about the need of</p> <p>3 copyright owners to obtain compensation for the</p> <p>4 digitization of their books?</p> <p>5 MR. McGOWAN: Objection, foundation.</p> <p>6 You may answer.</p> <p>7 A. So as I've said in the report, I</p> <p>8 don't think, I don't think there are a body of,</p> <p>9 for example, libraries or other entities, with</p> <p>10 an interest in digitizing books, who are willing</p> <p>11 to pay for licenses for less than the full text</p> <p>12 of books.</p> <p>13 And if this product helped those</p> <p>14 libraries, let's say, find the copyright</p> <p>15 holders, it might be valuable.</p> <p>16 But if it, if it doesn't solve that</p> <p>17 problem, I don't think it would be --it wouldn't</p> <p>18 meet an unmet need of a buyer.</p> <p>19 Q. What if it, what if the collective</p> <p>20 licensing organization created efficiencies for</p> <p>21 entities like libraries and others who are</p> <p>22 trying to get rights to use books?</p> <p>23 A. So it may be the case that some</p> <p>24 entities could create some efficiencies, but I</p> <p>25 don't -- I think what I'm saying is I don't see</p>	<p style="text-align: right;">Page 189</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 and widely disbursed music users, there was also</p> <p>3 the issue that the rights holders had a right to</p> <p>4 withhold the music users from listening to their</p> <p>5 works; right?</p> <p>6 MR. McGOWAN: Objection, incomplete</p> <p>7 hypothetical, lacks foundation</p> <p>8 significantly.</p> <p>9 You may answer.</p> <p>10 A. Sorry, so my understanding is that</p> <p>11 the purpose of ASCAP and BMI was that rights</p> <p>12 holders, you know, deposit their rights with</p> <p>13 ASCAP and BMI, and ASCAP and BMI provide an</p> <p>14 efficiency by tracking down and monitoring the</p> <p>15 disbursed rights users on the other side.</p> <p>16 Q. Do you understand that ASCAP and BMI</p> <p>17 arose after music users attempted to use music</p> <p>18 without paying royalties?</p> <p>19 MR. McGOWAN: Objection, foundation.</p> <p>20 You may answer.</p> <p>21 A. I don't know exactly. I don't know</p> <p>22 the history of ASCAP and BMI that completely.</p> <p>23 My understanding is that, you know,</p> <p>24 that these disbursed rights holders were</p> <p>25 required to pay for the music that they were</p>

<p style="text-align: right;">Page 190</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 performing, and that ASCAP and BMI served the</p> <p>3 intermediary function of negotiating and</p> <p>4 transacting with those disbursed rights holders.</p> <p>5 Q. So you don't know the genesis of it</p> <p>6 beyond what you said here?</p> <p>7 A. I know that ASCAP and BMI are a</p> <p>8 solution -- are a solution to the economic</p> <p>9 problem of disbursed rights holders.</p> <p>10 I don't know that much more about the</p> <p>11 history than that. Sorry, disbursed rights</p> <p>12 holders and disbursed users.</p> <p>13 Q. Right, but there would be no problem</p> <p>14 to solve from the perspective of the music</p> <p>15 users, if they didn't have to pay for the use of</p> <p>16 the music; right?</p> <p>17 MR. McGOWAN: Objection, foundation,</p> <p>18 calls for legal conclusion.</p> <p>19 A. So my understanding is that, yes, the</p> <p>20 users -- that the purpose of ASCAP and BMI, is</p> <p>21 to track down the users and get them to pay.</p> <p>22 Q. Because what they're using is</p> <p>23 copyrighted music?</p> <p>24 MR. McGOWAN: Same objections.</p> <p>25 A. So my understanding is that the user</p>	<p style="text-align: right;">Page 192</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 A. So I think as I've described in my</p> <p>3 report, what I said in my report is absent the</p> <p>4 existence of Google Books, I do not believe a</p> <p>5 market for snippet display would arise. That's</p> <p>6 the opinion I express in my report.</p> <p>7 Q. But you're not expressing the</p> <p>8 opposite?</p> <p>9 A. So I'm surely not expressing the</p> <p>10 opposite of the opinion in my report, but what's</p> <p>11 the -- what is your question?</p> <p>12 Q. You're not expressing the opinion</p> <p>13 that if Google, we have -- Google Books now</p> <p>14 exists?</p> <p>15 A. Yes.</p> <p>16 Q. And if a court determined that Google</p> <p>17 could not legally display snippets, are you</p> <p>18 expressing an opinion about whether or not</p> <p>19 Google, as a matter economics, would enter into</p> <p>20 a license to display snippets?</p> <p>21 MR. McGOWAN: Objection, incomplete</p> <p>22 hypothetical.</p> <p>23 You may answer.</p> <p>24 A. So I'm not expressing an opinion</p> <p>25 about whether Google would enter into licenses</p>
<p style="text-align: right;">Page 191</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 -- my understanding is that the users have to</p> <p>3 pay because the performance rights are a right</p> <p>4 that has, it has been determined by some, by a</p> <p>5 court that users of music, in these</p> <p>6 circumstances, have to pay.</p> <p>7 But the full scope of when users of</p> <p>8 music have to pay, etcetera, you know, is</p> <p>9 factually fairly complicated.</p> <p>10 Q. But you would agree that music users</p> <p>11 wouldn't be paying unless they had to; right?</p> <p>12 A. I am sure some music users would be</p> <p>13 paying, you know, if they didn't have to.</p> <p>14 But the point of ASCAP and BMI is to</p> <p>15 make sure they all pay, to collect from them.</p> <p>16 Q. So if it was determined that Google</p> <p>17 could not display snippets without permission</p> <p>18 under the copyright laws, are you expressing an</p> <p>19 opinion about whether a market would or would</p> <p>20 not develop for Google to pay for the use of the</p> <p>21 materials necessary for them to produce the</p> <p>22 snippets?</p> <p>23 MR. McGOWAN: Objection, incomplete</p> <p>24 hypothetical.</p> <p>25 You may answer.</p>	<p style="text-align: right;">Page 193</p> <p>1 J.A. Chevalier - C O N F I D E N T I A L</p> <p>2 with rights holders. They may well abandon the</p> <p>3 project. I don't know the answer to that.</p> <p>4 MS. ZACK: I don't have anymore</p> <p>5 questions.</p> <p>6 (Time noted: 2:59 p.m.)</p> <p>7</p> <p>8</p> <p>9 JUDITH A. CHEVALIER</p> <p>10</p> <p>11 Subscribed and sworn to before me</p> <p>12 this ____ day of _____, 2012.</p> <p>13</p> <p>14</p> <p>15 Notary Public</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>

Page 194	Page 196
1	1
2 CERTIFICATE	2 EXHIBITS (Cont'd)
3	3
4 STATE OF NEW YORK)	4 Defendant's Exhibit 97, a series of pages 181
5 : ss.	5 from the Internet concerning the acquisition
6 COUNTY OF NEW YORK)	6 by Google of Rightsflow
7	7
8 I, NANCY SORENSEN, Notary Public	8
9 within and for the State of New York, do	9
10 hereby certify:	10
11 That JUDITH A. CHEVALIER, the witness	11
12 whose deposition is hereinbefore set forth,	12
13 was duly sworn by me and that such	13
14 deposition is a true record of the	14
15 testimony given by the witness.	15
16 I further certify that I am not	16
17 related to any of the parties to this	17
18 action by blood or marriage, and that I am	18
19 in no way interested in the outcome of this	19
20 matter.	20
21 IN WITNESS WHEREOF, I have hereunto	21
22 set my hand this 8TH day of JUNE, 2012.	22
23	23
24	24
25 NANCY SORENSEN	25
Page 195	Page 197
1	1 ERRATA SHEET
2 ----- INDEX -----	2 VERITEXT REPORTING COMPANY
3 WITNESS EXAMINATION BY PAGE	2 1250 BROADWAY
4 JUDITH A. CHEVALIER MS. ZACK 4	2 NEW YORK, NEW YORK 10001
5	3 800-362-2520
6	4 CASE: AUTHORS GUILD, ET AL. VS. GOOGLE, INC.
7 ----- INFORMATION REQUESTS -----	4 DEPOSITION DATE: JUNE 8, 2012
8 DIRECTIONS:	5 DEPONENT: JUDITH A. CHEVALIER
9 RULINGS:	6 PAGE LINE(S) CHANGE REASON
10 TO BE FURNISHED:	7
11 REQUESTS: 20	8
12 MOTIONS:	9
13	10
14 ----- EXHIBITS -----	11
15 PLAINTIFF'S FOR ID.	12
16	13
17 Plaintiff's Exhibit 95, Expert 4	14
18 Report of Judith A. Chevalier	15
19	16
20 Plaintiff's Exhibit 96, a number of 4	17
21 pages collected from Google's website	18
22 concerning the Partner Program	19
23	20
24	21
25	22 JUDITH A. CHEVALIER
	23 SUBSCRIBED AND SWORN TO BEFORE ME
	24 THIS ____ DAY OF _____, 20__.
	25 (NOTARY PUBLIC) MY COMMISSION EXPIRES:

50 (Pages 194 - 197)

VERITEXT REPORTING COMPANY

212-279-9424

www.veritext.com

212-490-3430

*Confidential***Errata Sheet**

Name of Case: THE AUTHORS GUILD, et al. v. GOOGLE, INC.

Date of Deposition: June 8, 2012

Name of Deponent: Professor Judith A. Chevalier

Page	Line	Change	To	Reason
5	12	analysis group	Analysis Group	Typographical error
11	23	So that in that case	So in that case	Misquote
18	12	listing of members of publishers that were	listing of members - of publishers that were members	Punctuation error
22	22	I did similar	I did similarly	Misquote
23	8	variety of platform	variety of platforms	Misquote
24	17	on his reports	on his report	Typographical error
26	8-11	this is "Amazon announces the first publicly available source. Amazon announces sales impact from new Search Inside the Book features."	this is "Amazon announces..." – the first publicly available source – "Amazon announces sales impact from new Search Inside the Book features."	Punctuation error
36	19-20	all of the books in the partner Program	all of their books in the Partner Program`	Misquote
38	9	some cost	some costs	Typographical error
38	22	why my understanding	why -- my understanding	Typographical error
44	16-18	and so to the extent that, you know, copyrights and perhaps they play a particular role in the economics of technology	and so to the extent that, you know, copyrights and patents play a particular role in the economics of technology	Misquote
46	8	compliment	complement	Misquote
48	6	opinions about their	opinions about the	Misquote
48	11	Expert reports for academic	Expert reports or academic	Misquote
50	10	the deposition Stephane	the deposition of Stephane	Missing word
55	24	the add revenues	the ad revenues	Misquote

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60	19-25	On the preview page for your book, we display a set of links to buy the books at the major retailers, as well as to a site of your choice. These links are not paid for by the site features. Clicking on a link to purchase your book at an on-line retailer, won't generate any revenue directly.	"On the preview page for your book, we display a set of links to buy the books at the major retailers, as well as to a site of your choice. "These links are not paid for by the site features. Clicking on a link to purchase your book at an on-line retailer, won't generate any revenue directly."	Missing punctuation
61	17-18	combined with what do I earn from the program,	combined with "what do I earn from the program,"	Missing punctuation
61	20-21	and what do I earn from this program	and "what do I earn from this program"	Missing punctuation
63	23-24	interest in demand	interest and demand	Misquote
71	4	is a compliment	is a complement	Misquote
80	18	So is my understanding	So it is my understanding	Missing word
93	6-7	the message you have searched this book too many times	the message "you have searched this book too many times"	Missing punctuation
108	5	Well, I may	While I may	Misquote
108	19-21	the important test for whether tests for whether a good is a new good	the important test for whether -- tests for whether a good is a new good	Missing punctuation
111	4	is a compliment	is a complement	Misquote
112	15	as I explained in the thing	as I explained in the beginning	Misquote
113	5	That's if's	That's if	Misquote
113	21	is the scan	is the scanned	Typographical error
114	7-8	Google has provided the functionality of two libraries for libraries	Google has provided the functionality to libraries -- for libraries	Misquote
115	15-16	that at the output	that the output	Misquote
116	16	use of the word employs	use of the word "employs"	Missing punctuation

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122	17-18	I'm not an expert in the exactity of exactly how	I'm not an expert in exactly how	Misquote
124	3	Google Go Books	Google Books	Typographical error
127	19	more relevant in the marketplace	more prevalent in the marketplace	Misquote
129	18	ff I	if I	Typographical error
130	9	moved to those books off	sold those books off	Misquote
138	6	there's a number sites	there's a number of cites	Misquote
139	6	As though	Although	Typographical error
140	5	I'm exactly sure	I'm not exactly sure	Missing word
143	18	If the publisher wasn't more	If the publisher wants more	Typographical error
151	16-19	My analysis is neither assuming, nor expressing an opinion about what Google does. It's about what whether Google does is a fair use	My analysis is neither assuming, nor expressing an opinion about whether what Google does. It isn't about whether what Google does is fair use	Misquote
154	25	primarily	primary	Misquote
160	11	compliment	complement	Misquote
172	5	is that the	is the	Extra word
172	19	The word	they were	Misquote
180	8	disbursed	dispersed	Misquote
180	16	disbursed	dispersed	Misquote
180	18	disbursed	dispersed	Misquote
183	5	by which	about which	Misquote
189	15	disbursed	dispersed	Misquote
189	24	disbursed	dispersed	Misquote
190	4	disbursed	dispersed	Misquote
190	9	disbursed	dispersed	Misquote
190	11	disbursed	dispersed	Misquote
190	12	disbursed	dispersed	Misquote

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A handwritten signature in cursive script, appearing to read "Judith A. Chevalier".


Judith A. Chevalier
July 11, 2012

Page 193

1 J.A. Chevalier - C O N F I D E N T I A L
2 with rights holders. They may well abandon the
3 project. I don't know the answer to that.

4 MS. ZACK: I don't have anymore
5 questions.

6 (Time noted: 2:59 p.m.)

7
8 

9 JUDITH A. CHEVALIER

10

11 Subscribed and sworn to before me
12 this ____ day of _____, 2012.

13

14

15 _____
Notary Public

16

17

18

19

20

21

22

23

24

25

EXHIBIT 43

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Attorneys for Defendant
Google Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC., Associational
Plaintiff, BETTY MILES, JOSEPH
GOULDEN, and JIM BOUTON, on behalf of
themselves and all other similarly situated,

Plaintiffs,

v.

GOOGLE INC.,

Defendant.

Civil Action No. 05 CV 8136 (DC)

ECF Case

**DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO
PLAINTIFFS' FIRST SET OF INTERROGATORIES**

Pursuant to Federal Rule of Civil Procedure 26 and 33, Defendant Google Inc. (“Google”), by its attorneys, hereby responds and objects to Plaintiffs’ First Set of Interrogatories (the “Interrogatories”) dated March 14, 2012.

These responses are based on the information currently available to Google. Google reserves the right to amend, supplement or modify its responses and objections at any time in the event that it obtains additional or different information.

GENERAL OBJECTIONS

1. Google objects to the preface, instructions, and definitions to the Requests to the extent that they purport to impose obligations that exceed those imposed by the Federal Rules of Civil Procedure, relevant local rules, and applicable case law. In responding to these requests, Google has followed the applicable law and has ignored the improper preface, instructions, and definitions.

2. Google objects to the Requests in their entirety and to each request to the extent that the documents and information sought are protected from discovery by the attorney-client privilege, the work-product doctrine, or any other applicable privilege.

3. Google objects to each and every request to the extent that it seeks information that is confidential and/or proprietary information. To the extent not otherwise subject to objection, Google will provide such confidential information in accordance with the terms of the protective order entered in this case.

4. Google objects to Plaintiffs’ definition of “Google” as vague, ambiguous, unintelligible, and overly broad. For purposes of responding to these discovery requests, Google will interpret “Google” to mean Google, Inc. and/or its agents.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 1:

Identify all factual and legal bases supporting Google's defense that its digital copying in libraries of Books in their entirety is a fair use under 17 U.S.C. § 107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 1:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory's use of the term "digital copying in libraries of Books" is vague and ambiguous, and understands it to refer to Google's digitization of Books from library collections. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google's digitization of Books from library collections is a fair use under 17 U.S.C. § 107. Specifically:

- The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in favor of a finding of fair use.
 - The purpose and character of Google's use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
 - The purpose of Google's use is to assist users in identifying Books which may be of interest by creating a search engine by which the text of Books may be searched.

- Google's digitized copies do not serve as a substitute for Books, but rather are necessary to create Google's book search engine, which is a new tool for finding books.
- The nature of Google's use is at least partially noncommercial, because the use facilitates access to the collections of libraries, enables research and scholarship, and does not directly generate revenue for Google.
- The "nature of the copyrighted work" weighs in favor of a finding of fair use.
 - All of the Books at issue have been published.
 - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
 - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
- The "amount and substantiality of the portion used in relation to the copyrighted work as a whole" weighs in favor of a finding of fair use.
 - Because the use is transformative, and the use of the whole is necessary to the transformative purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified, the digitization of the entire work does not militate against a finding of fair use.

- The “effect of the use upon the potential market for or value of the copyrighted work” weighs in favor of a finding of fair use.
 - A search engine is not a market substitute for a book.
 - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
 - There is no market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified.
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a traditional market.
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a reasonable market.
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is not a market which is likely to be developed.
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified is a transformative market, and is thus not cognizable.
- Balanced in light of the purposes of copyright, the four factors favor fair use.
 - Each factor either favors fair use or is neutral.

- A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors.
Google's use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

In addition, Google's use is fair because it is necessary to the fair use purpose set forth in Google's response to Interrogatory No. 3. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 2:

Identify all factual and legal bases supporting Google's defense that its distribution to libraries of entire digital copies of Books is a fair use under 17 U.S.C. § 107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 2:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google does not distribute entire digital copies of Books to libraries. Rather, Google makes available to libraries an automated system, called GRIN, by which a library may choose to create and download digital copies of Books which have been scanned from its collection. A

library performs the volitional acts which result in the creation of the digital copies which are created by the GRIN system and which result in the transmission of the content of those digital copies to that library. Accordingly, Google can be at most liable under doctrines of secondary liability, and cannot be directly liable for the library copies.

Google is not secondarily liable with respect to the library copies. First, Google is not secondarily liable with respect to the library copies under any theory of secondary liability because there is no underlying act of direct infringement by the libraries, since the libraries' volitional acts in creating and downloading the library copies are fair use, not infringement. Second, Google is not vicariously liable because vicarious liability requires a financial benefit directly attributable to the particular infringing activity, and Google does not derive any financial benefit directly attributable to the library copies. Third, Google is not liable under a theory of contributory liability because (1) the GRIN system has at least substantial noninfringing uses; (2) the libraries were and are contractually bound to use the GRIN system only in a noninfringing manner; and (3) Google lacks knowledge of any use of the GRIN system which is infringing, as opposed to fair use.

The libraries' volitional acts in creating and downloading the library copies are fair use under 17 U.S.C. § 107. Specifically:

- The libraries' use is in part for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.
- The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in favor of a finding of fair use.

- The purpose and character of the libraries' use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
 - One purpose of the libraries' use is to assist users in identifying books which may be of interest by creating a search engine by which the text of books may be searched.
 - The libraries' digitized copies do not serve as a substitute for Books, but rather are necessary to create the libraries' book search engine, which is a new tool for finding books.
- The nature of the libraries' use is entirely for nonprofit educational purposes.
- The "nature of the copyrighted work" weighs in favor of a finding of fair use.
 - All of the Books at issue have been published.
 - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
 - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
- The "amount and substantiality of the portion used in relation to the copyrighted work as a whole" weighs in favor of a finding of fair use.

- Because the use is transformative, and the use of the whole is necessary to the transformative purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified, the digitization of the entire work does not militate against a finding of fair use.
- The “effect of the use upon the potential market for or value of the copyrighted work” weighs in favor of a finding of fair use.
 - A search engine is not a market substitute for a Book.
 - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
 - There is no market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive.”
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is not a traditional market.
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is not a reasonable market.
 - The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is not a market which is likely to be developed.

- The market for a license to scan Books for the purpose of creating a search engine by which the text of books may be searched so that books of interest may be identified or for the creation of a “dark archive” is a transformative market, and is thus not cognizable.
- Balanced in light of the purposes of copyright, the four factors favor fair use.
 - Each factor either favors fair use or is neutral.
 - A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors. The libraries’ use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

Google provides this response as a courtesy to Plaintiffs, and the burden of proving infringement (be it direct or secondary) remains with Plaintiffs. To the extent Google performed any volitional act with respect to library copies, which Google denies, Google’s conduct was fair use because it was necessary to the foregoing fair use purposes and was conducted at the behest of the libraries expressly for the purpose of achieving the foregoing fair use purposes. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 3:

Identify all factual and legal bases supporting Google’s defense that its display of verbatim expression from Books in response to search requests is a fair use under 17 U.S.C. §

107, including without limitation all facts Google intends to rely on with respect to the four factors set forth in Section 107.

RESPONSE TO INTERROGATORY NO. 3:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory's use of the term "display of verbatim expression from Books in response to search requests" is vague and ambiguous, and understands it to refer to Google's display of snippets of Books from library collections in response to search requests. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google's display of snippets of Books from library collections in response to search results is a fair use under 17 U.S.C. § 107. Specifically:

- The "purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes," weighs in favor of a finding of fair use.
 - The purpose and character of Google's use is transformative, because it adds something new, with a further purpose or different character, and does not merely supersede the objects of the original.
 - The display of snippets is important to helping users find books which may be of interest.
 - The snippets displayed do not serve as a substitute for Books, but instead serve as a tool to identify books which are of interest.

- Snippets are not displayed with respect to those Books for which there is a possibility that a snippet could serve as a substitute for a Book, such as dictionaries and books of quotations.
 - The nature of Google's use is at least partially noncommercial, because the use facilitates access to the collections of libraries, enables research and scholarship, and does not directly generate revenue for Google.
- The "nature of the copyrighted work" weighs in favor of a finding of fair use.
 - All of the Books at issue have been published.
 - Some of the Books at issue are factual in nature, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the Books at issue are less factual in nature, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
 - Some of the Books at issue are out of print, and as to those Books, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the Books at issue are in print, and as to those Books, this factor tilts less strongly in favor of a finding of fair use.
 - Some of the snippets at issue are factual in nature, and as to those snippets, this factor tilts more strongly in favor of a finding of fair use.
 - Some of the snippets at issue are less factual in nature, and as to those snippets, this factor tilts less strongly in favor of a finding of fair use.
- The "amount and substantiality of the portion used in relation to the copyrighted work as a whole" weighs in favor of a finding of fair use.
 - Snippets are displayed only in response to user search queries.

- Each snippet is only approximately one-eighth of a page.
- At maximum, three snippets are displayed in response to a particular search query.
- Only snippets containing the user's search query are displayed.
- The location of a snippet on a page is fixed.
- Some snippets are blacklisted.
- Some pages are blacklisted.
- Measures are in place to prevent any one user, or users in the aggregate, from abusing the system by repeated queries.
- Some of the snippets at issue are taken from long books, and as to those snippets this factor tilts more strongly in favor of fair use.
- Some of the snippets at issue are taken from short books, and as to those snippets this factor tilts less strongly in favor of fair use.
- The "effect of the use upon the potential market for or value of the copyrighted work" weighs in favor of a finding of fair use.
 - A snippet is not a market substitute for a Book.
 - The effect of the use on the traditional market for the sale of Books is positive, because it enables the creation of a search engine by which the text of books may be searched so that books of interest may be identified.
 - There is no market for a license to display short snippets as part of a search engine so that books of interest may be identified.
 - The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a traditional market.

- The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a reasonable market.
- The market for a license to display short snippets as part of a search engine so that books of interest may be identified is not a market which is likely to be developed.
- The market for a license to display short snippets as part of a search engine so that books of interest may be identified is a transformative market, and is thus not cognizable.
- Balanced in light of the purposes of copyright, the four factors favor fair use.
 - Each factor either favors fair use or is neutral.
 - A finding of fair use promotes the purpose of copyright, which is to promote the dissemination of knowledge by granting limited exclusive rights to authors.

Google's use promotes the dissemination of knowledge, by assisting users in identifying books which may be of interest, while not serving as a substitute for the Books themselves.

Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 4:

Identify by title, author, publisher and ISBN (if applicable) all Books as to which Google claims a license to digitally copy in full, and for each Book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 4:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google’s response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs’ contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 5:

Identify by title, author, publisher and ISBN (if applicable) all Books as to which Google claims a license to distribute digital copies to libraries, and for each Book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 5:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google's response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 6:

Identify by title, author, publisher and ISBN (if applicable), all Books as to which Google claims a license to display verbatim expression in response to search requests, and for each book identify all factual and legal bases supporting the defense of license.

RESPONSE TO INTERROGATORY NO. 6:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than "the claims and contentions" of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google claims the defense of license with respect to those Books listed in the document bearing Bates number GOOG05004752. Google is permitted by law, at least under the doctrine of fair use, to digitally copy in full all of the remaining Books at issue, as set forth in Google's response to Interrogatory No. 1. Google reserves the right to make different or additional contentions for the purpose of rebutting Plaintiffs' contentions. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

INTERROGATORY NO. 7:

Identify any and all affirmative defenses other than fair use and license which Google claims in this case and, for each such defense, identify all factual and legal bases supporting such defense.

RESPONSE TO INTERROGATORY NO. 7:

Google objects to this interrogatory to the extent it calls for attorney-client privileged information, attorney work product, or information protected by any other privilege or immunity. Google objects to this interrogatory to the extent it seeks more than “the claims and contentions” of Google, as permitted by Local Civil Rule 33.3(c). Subject to and without waiving these objections, Google responds as follows:

Google does not claim any affirmative defenses other than fair use and license affirmative defenses with respect to Plaintiffs’ claims of direct copyright infringement as to Books scanned from the collections of libraries, but does not intend to waive any such defenses to the extent they overlap with Google’s fair use and license defenses. Google reserves the right to present different or additional affirmative defenses in the event Plaintiffs make other or further claims, or for the purpose of rebutting Plaintiffs’ contentions. Google reserves the right to present defenses which rebut or negate elements upon which Plaintiffs bear the burden, which defenses are not encompassed within this interrogatory because they are not affirmative defenses. Pursuant to the agreement of the parties, Google is willing to meet and confer in good faith in the event Plaintiffs require additional details regarding the contentions identified herein.

Dated: April 27, 2012

Respectfully submitted,

By: /s/ Joseph C. Gratz

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in San Francisco County, State of California, in the office of a member of the State Bar of California, at whose direction the service was made. I am over the age of eighteen years, and not a party to the within action. My business address is 217 Leidesdorff Street, San Francisco, CA 94111.

On April 27, 2012, I served the following document(s) in the manner described below:

**DEFENDANT GOOGLE INC.'S RESPONSES AND OBJECTIONS TO
PLAINTIFFS' FIRST SET OF INTERROGATORIES**

- ☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Francisco, California.
- ☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.
- ☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- ☐ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Durie Tangri LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.
- ☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Durie Tangri's electronic mail system from jcotton@durietangri.com to the email addresses set forth below.
- ☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

Michael J. Boni
Joanne E. Zack
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15 St. Asaphs Road
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Fax: 610-822-0206
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Attorneys for Plaintiffs

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 27, 2012, in San Francisco, California.

/s/ Janelle Cotton

Janelle Cotton